

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

MANUEL S. MADRUGA, PETITIONER,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
IN AND FOR THE COUNTY OF SAN DIEGO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAR. 13, 1953.

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[fol. 1]

[File endorsement omitted]

**SUMMONS ISSUED**

**IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY OF SAN  
DIEGO**

**No. 173337**

**EDWARD X. MADRUGA, JOE B. SILVEIRA, ANTHONY D. MADRUGA, JOSEPH MADRUGA, JOSEPH BOGDANOVICH, NICHOLAS TRUTANICH, JOHN TRIPPS, AND VINCENT GANN, Plaintiffs,**

**VS.**

**MANUEL S. MADRUGA, Defendant.**

**COMPLAINT FOR PARTITION—Filed May 29, 1952**

Come now the plaintiffs above named and for cause of action allege as follows:

**I**

That plaintiffs and defendant are co-owners of the Oil Screw Vessel Liberty, Official No. 256 332, which said vessel is now docked in the City of San Diego, County of San Diego, State of California, the home port of said vessel being San Diego, California.

**II**

That the parties to this action own undivided interests in said vessel in the following percentages:

Edward X. Madruga	30%	Joe B. Silveira	30%
Anthony D. Madruga	5%	Joseph Madruga	5%
Manuel S. Madruga	15%	Joseph Bogdanovich	3%
Nicholas Trutanich	3½%	John Tripps	3½%
Vincent Gann	5%		

[fol. 2]

**III**

That there are no liens or encumbrances against said vessel and that no person other than the plaintiffs and defendant are interested in said vessel as owners or otherwise.

## IV

That the value of said vessel is in excess of \$3,000.00.

Wherefore, plaintiffs pray:

1. That the court order said vessel to be sold and the proceeds of said sale partitioned between the parties according to their respective interests in said vessel.

2. That plaintiffs be allowed their costs and reasonable attorney's fees.

3. And for such other and further relief as the Court may deem meet and equitable in the premises.

Luce, Forward, Kunzel & Scripps. By Fred Kunzel,  
Attorneys for Plaintiffs.

*Duly sworn to by Edward X. Madruga. Jurat omitted in printing.*

[fol. 3]

[File endorsement omitted]

IN SUPERIOR COURT OF SAN DIEGO COUNTY

[Title omitted]

Within demurrer this 18th day of June 1952.

Overruled—15 days to answer.

In Department No. 2 L. N. T.

DEMURRER AND ORDER OVERRULING SAME—Filed June 9, 1952

Comes now the defendant in the above entitled matter and demurs to plaintiff's complaint on the following grounds, to wit:

## I

That the court has no jurisdiction of the subject of the action.

## II

That the complaint does not state facts sufficient to constitute a cause of action.

## III

That the complaint is ambiguous in that it can not be ascertained therefrom what, if any dispute or controversy exists between the parties.

## IV

That the complaint is unintelligible in the same particulars in which it is ambiguous.

[fol. 4]

## V

That the said complaint is uncertain in the same particulars in which it is ambiguous and unintelligible.

Dated this 7th day of June, 1952.

Levenson, Levenson & Block. By Eli H. Levenson,  
Attorneys for Defendant.

[fol. 5]

## Points and Authorities

C.C.P. 430, Sub. Par. 1, Sub. Par. 6, 7, 8, and 9.

I, Eli H. Levenson, one of the attorneys for the above named defendant, do hereby certify that the above demurrer to plaintiff's complaint is not interposed for the purpose of delay and that in my opinion the issues therein raised are well taken in law.

Eli H. Levenson.

Proof of service [omitted in printing].

[fol. 6]

[File endorsement omitted]

IN SUPERIOR COURT OF SAN DIEGO COUNTY

[Title omitted]

ANSWER—Filed July 23, 1952

Comes now the defendant above named, and in answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

## I

Admits each and every allegation contained in Paragraph

I.

## II

Admits each and every allegation contained in Paragraph II.

## III

Answering Paragraph III, this answering defendant does not have sufficient information, and basing his denial upon such lack of information, denies generally and specifically, each and every allegation contained in said paragraph III.

## IV

Admits each and every allegation contained in Paragraph IV.

[Vol. 7] And for a second, separate and distinct defense, this answering defendant admits, denies and alleges as follows:

### I

That said complainant seeks relief by having said vessel partitioned and sold, and the proceeds of said sale partitioned between the parties, according to their respective interests. That this court is without jurisdiction to grant such relief, in that said vessel is a certificated vessel, under the maritime laws of the United States, and that the District Court of the United States, sitting in Admiralty, is the only and proper court having jurisdiction to cause a partition of said vessel.

And for a third, separate and distinct defense, this answering defendant admits, denies and alleges as follows:

### I

That defendant has heretofore petitioned to the District Court of Appeal for a Writ of Prohibition to prohibit this court from proceeding on said complaint, for the reason that this court is without jurisdiction and that the United States District Court, sitting as a court in Admiralty, is the only and proper court having jurisdiction.

## II

That the District Court of Appeal of the State of California, in and for the Fourth Appellate District did, on the

3rd day of July, 1952, denied said petition for a writ of prohibition; that the order of denial by said District Court of Appeal of the State of California, in and for the Fourth Appellate District, is not now, and will not be final until the 3rd day of August, 1952. That when said order denying said petition becomes final, this defendant will present a petition for rehearing of said petition to the Supreme Court of the the State of California, on the grounds that the Superior Court of the State of California is without jurisdiction to partition a certificated vessel, and that the United [fol. 8] States District Court sitting as a court in Admiralty, is the only and proper court having jurisdiction to cause a partition of such a vessel.

Wherefore, defendant prays that plaintiffs take nothing by reason of their complaint on file herein, for costs of suit herein incurred, and for such other and further relief as to the court may seem meet and just in the premises.

Levenson, Levenson & Block. By Eli H. Levenson,  
Attorneys for Defendant.

Proof of service [omitted in printing].

[fol. 9] *Duly sworn to by Manuel S. Madruga. Jurat omitted in printing.*

[fol. 10] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF  
CALIFORNIA IN AND FOR THE FOURTH APPELLATE DISTRICT

No. 4C4521

MANUEL S. MADRUGA, Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE  
COUNTY OF SAN DIEGO, Respondent

RESPONDENT'S POINTS AND AUTHORITIES IN OPPOSITION TO  
PETITION FOR WRIT OF PROHIBITION—Filed June 30, 1952

The pending action in the Superior Court was filed to partition the vessel "Liberty" by a majority of the owners

of the vessel pursuant to Sections 753 to 801.15 of the California Code of Civil Procedure. The majority of the owners consists of all the owners with the exception of petitioner herein, who owns a 15% interest in the vessel.

The petition for writ of prohibition herein is sought upon the basis that a State Court does not have jurisdiction to partition a vessel. In support of this contention petitioner cites the case of *Fischer v. Carey*, 173 Cal. 186.

In the above cited case the appeal was from an order of the trial court appointing a receiver to operate the vessel upon the complaint of minority owners of the vessel. The order of the trial court appealed from appears at page 186 of the decision as follows:

[fol. 11] "to operate said vessel if it appears in the judgment of said receiver such operation can be done at a profit and to preserve the vessel, her earnings and appurtenances until the further order of the court."

The complaint prayed for an accounting for the appointment of a receiver, and for an order decreeing the sale of the vessel and a division of the proceeds ratably amongst the part owners. The Supreme Court reversed the order appointing the receiver and in so doing, the Court stated at page 198:

"... that the power of a state court does not go to the length here exercised, of appointing a receiver and decreeing a sale because of the differences over the management of the vessel which have sprung up between the legal owners of that vessel."

In our opinion the court reached the proper conclusion. Statements made by the court relative to partition are pure dictum inasmuch as the trial court made no order for partition. The court merely followed the ancient admiralty rule that the courts will not, upon petition of a minority owner, interfere with the management, control or operation of a vessel. The Admiralty Courts, so as to not allow a circumvention of the above rule, also have refused to partition a vessel on the petition of a minority owner and have stated that they would not partition except where the interests of the vessel are equal. The reason for this rule is that

where the interests are equal and there is disension between equal owners the vessel cannot be operated and therefore the court will partition to keep the vessel in operation.

"Cases of licitation or sale, for the purpose of partition, are also within the power of the American admiralty as they are of the European maritime courts, such jurisdiction being exercised only as between equal interests. A decree of partition or licitation cannot issue merely upon a libel *in rem*; it is essential that the co-owner be also sued and served *in personam*." 1 *Benedict on Admiralty* at page 158.

*The Red Wing*, 10 Fed. 2d 369:

"Inasmuch as Kordich and respondents are not co-partners or co-owners in the *Red Wing* in equal shares, the subject-matter of this proceeding is not within the [fol. 12] purview of admiralty, for the rule is generally and uniformly established by the Supreme Court that the jurisdiction of courts of admiralty in cases of part owners having unequal interests is not and never has been applied to direct a sale upon any dispute as to the trade and navigation of the ship. *The Steamboat Orleans*, 11 Pet. 182, 9 L. Ed. 677; *Coyne v. Caples* (D. C.), 5 F. 638."

The Court in the case of *Fischer v. Corey*, in its stated reasons for the decision, fell in error in three particulars; one, in the assumption that a partition action is *in rem*; second, that all actions pertaining to a vessel are *in rem*; and third, that all admiralty actions are *in rem*.

A partition action is not an action *in rem* unless it is a partition of real property and brought within the purview of Section 749.1 of the California Code of Civil Procedure. 40 Am. Jur. 112, Sec. 134:

"*Unknown Persons*.—The statutes of many of the states authorize the process in suits for partition to be directed to unknown owners or to all owners and claimants, known and unknown, in certain contingencies therein designated, and to be served by the publica-

tion thereof as of course notice requiring all persons to appear and disclose and assert their claims to the property. Wherever such statutes exist and have been complied with, the proceeding becomes one in rem, and is conclusive against all persons irrespective of the character or extent of their title."

An action in rem is where the object of the action is to determine the rights of the world to certain property. The distinction between an action in rem and an action in personam against a vessel is well stated by Judge Hughes in the case of *F. T. Howards v. Cloverport Foundry & Machine Company*, 237 U. S. 303 (303 S. Ct. 596, 59 L. Ed. 966), wherein it is stated:

"As the last point is plainly well taken, it is unnecessary to go further. It is well settled that in an action in personam the state court has jurisdiction to issue an auxiliary attachment against the vessel; and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transcended its authority. The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing all [fol. 13] persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes, and not merely the title or interest of a personal defendant."

See also *United States of Mexico v. Rusk*, 118 C. A. 21 at page 49.

It has never been held that a state court or an admiralty court, for that matter, lack jurisdiction to partition a vessel upon a request by the majority of the owners. Partition actions are favored in law and as such there exists no valid reason why an owner of a 15% interest in the vessel should be able to keep the owners of an 85% interest in

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the vessel from selling it if they feel that the reasons for the sale are valid.

40 Am. Jur. 3, Sec. 4:

*"Nature and Object.*—Partition is a right much favored, upon the ground that it not only secures peace, but promotes industry and enterprise. The rule of the civil as of the common law that no one should be compelled to hold property in common with another grew out of a purpose to prevent strife and disagreement. Additional reasons are found, however, in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding. Partition proceedings enable those who own property as joint tenants, coparceners, or tenants in common, to put an end to the tenancy so as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and after partition, each has the right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accomplished, then the joint estate ought to be sold, and the proceeds divided. Court should be, and are, adverse to any rule which will compel unwilling persons to use their property in common."

Dated this 30th day of June, 1952.

Respectfully submitted, Luce, Forward, Kunzel &  
Serippa, by Fred Kunzel, Attorneys for Respondent.

[fol. 14]      [File endorsement omitted]

IN SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING—Filed August 9, 1952

To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the State of California:

The District Court of Appeal of the State of California, in and for the Fourth Appellate District, filed its opinion on the 3rd day of July, 1952, denying the petition of petitioner

hereln for a Writ of Prohibition. A copy of the order of said District Court of Appeal is attached hereto and made a part hereof, as though set forth at length.

### Preliminary Statement

This action was brought by plaintiffs, as co-owners of a certain vessel, to partition the same. Petitioner, one of the minority owners of said vessel, demurred to the complaint on the grounds that the Superior Court of the State of California was without jurisdiction to cause a partition of the vessel, and that the United States District Court, [fol 15] sitting in Admiralty, was the only and proper court having jurisdiction. Said demur-er was overruled and petitioner ordered to answer the complaint. A Petition for Writ of Prohibition was filed with the District Court of Appeal of the State of California, in and for the Fourth Appellate District, which petition was denied, and petitioner asks for a hearing by this Court by reason of said denial, on the following grounds:

1. To secure uniformity of the decision, and settlement of important questions of law in that this Honorable Court has heretofore held that an action for partition of a vessel seeking the appointment of a receiver and order decreeing the sale of a vessel and a ratable division of the proceeds, is not an action in which the state courts of California have jurisdiction, but that the jurisdiction of such an action lies in the Admiralty Courts of the United States.

That a copy of the Petition for Writ of Prohibition, as presented to the District Court of Appeal of the State of California, in and for the Fourth Appellate District, is attached hereto and made a part hereof, as though set forth at length.

Wherefore, appellant respectfully requests hearing in this Court of the above entitled matter.

Respectfully submitted, Levenson, Levenson & Block,  
by (S.) Eli H. Levenson, Attorneys for Appellant.

[f. 16]

[File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE FOURTH APPELLATE DISTRICT

[Title omitted]

PETITION FOR WRIT OF PROHIBITION—Filed June 27, 1952

To the Honorable, the District Court of Appeal of the State  
of California, in and for the Fourth Appellate District:

The petition of Manuel S. Madruga respectfully shows:

I

That on or about the 29th day of May, 1952, a complaint was filed in the Superior Court of the State of California, in and for the County of San Diego, entitled, "Edward X. Madruga, Joe B. Silveira, Anthony D. Madruga, Joseph Madruga, Joseph Bogdanovich, Nicholas Trutanich, John Tripps, and Vincent Gann, Plaintiffs, vs. Manuel S. Madruga, Defendant, No. 173337, Complaint for Partition." That at said time the plaintiffs in said action caused summons to be issued, which summons directed the defendant, your petitioner herein, to appear in said action within ten days after service thereof. That a copy of said complaint so filed and summons issued are attached hereto respectively as "Exhibit A" and "Exhibit B", and incorporated herein as though set forth at length.

II

That said complaint purports to set forth a cause of action against petitioner for the purpose of partitioning a certificated vessel, as more particularly set forth in said complaint, and the plaintiffs in said action seek relief in said complaint by having said vessel sold, and the proceeds of said sale partitioned between the parties, according to their respective interests in said vessel.

III

That in pursuance of said summons, petitioner did file with the Superior Court of the State of California, in and

for the County of San Diego, a Demurrer to said complaint on the following grounds, to wit:

(A) That the court has no jurisdiction of the subject of the action.

(B) That the complaint does not state facts sufficient to constitute a cause of action.

(C) That the complaint is ambiguous in that it cannot be ascertained therefrom what, if any dispute or controversy exists between the parties.

(D) That the complaint is unintelligible in the same particulars in which it is ambiguous.

(E) That the said complaint is uncertain in the same particulars in which it is ambiguous and unintelligible.

That at the hearing of said Demurrer on Wednesday, June 18, 1952, petitioner, through his counsel, did attend and appear before the Superior Court of the State of California, in and for the County of San Diego, Department Two thereof, and did present said demurrer, and did then [fol. 18] and there object to the jurisdiction of said court to entertain said action, upon the grounds that the complaint sets forth on its face that the vessel sought to be partitioned is a certificated vessel under the maritime laws of the United States and that the District Court of the United States, sitting in admiralty, was the only and proper court having jurisdiction to cause a partition of such a vessel.

#### IV

That the said court notwithstanding the objections set forth by petitioner, by way of the Demurrer presented, did then and there overrule said Demurrer, and refuse to dismiss the said action, and did then and there decide that the Superior Court of the State of California, in and for the County of San Diego had jurisdiction of the subject matter of said action, and allowed petitioner a period of fifteen days within which to file an answer to the complaint of plaintiffs in said action, and petitioner is informed and believes that unless an answer is filed in accordance with the ruling of the court, as set forth above, said court will proceed to try the same and render judgment by default against

your petitioner, unless this court, by its Writ of Prohibition shall otherwise order.

V

That petitioner has no speedy or adequate remedy by appeal or otherwise in that if said action proceeds to trial and judgment of partition ordered, said vessel will be sold, to the detriment of petitioner, and an appeal or other remedy from said judgment will not provide an adequate remedy to petitioner to protect his interests in said vessel.

Wherefore, your petitioner prays that this court issue its Writ of Prohibition, commanding said court to desist from any further proceedings in said action.

Levenson, Levenson & Block, by Eli H. Levenson,  
Attorneys for Petitioner.

[fol. 19] *Duly sworn to by Eli H. Levenson. Jurat omitted in printing.*

[fols. 20-21] Exhibit "A"—Complaint for Partition. Omitted. Printed side page 1 ante.

### EXHIBIT B

[fol. 22] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

EDWARD X. MADRUGA, JOE B. SILVEIRA, ANTHONY D. MADRUGA,  
JOSEPH MADRUGA, JOSEPH BOGDANOVICH, NICHOLAS TEUTANICH, JOHN TRIPPS AND VINCENT GANN, Plaintiffs,

vs.

MANUEL S. MADRUGA, Defendant.

No. 173337

### SUMMONS ON COMPLAINT FOR PARTITION OF PERSONAL PROPERTY

Action brought in the Superior Court of the State of California in and for the County of San Diego, and the Com-

plaint filed in said County of San Diego, in the office of the Clerk of the Superior Court.

The people of the State of California send greeting:

To: Manuel S. Madruga

You are hereby directed to appear and answer to a Complaint in an action entitled as above, brought against you in the Superior Court of the State of California, in and for the County of San Diego, within ten days after the service on you of this summons—if served within this County; or within thirty day if served elsewhere.

It is sought by said complaint filed in said action to have the following described property partitioned, to wit:

That certain Oil Screw vessel named Liberty, Official No. 256 332, built at Tacoma, Washington, in 1948, with her home port at San Diego, California.

[fol. 23] And you are hereby notified that unless you appear and answer as above required, the said plaintiffs will take judgment for any money or damages demanded in the Complaint, as arising upon contract or they will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of San Diego, State of California this 29th day of May, 1952 By T. H. Sexton, Clerk, R. W. Candee, Deputy.

Luce, Forward, Kunzel & Scripps, Attorneys for Plaintiffs.

Appearance: A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of appearance. The appearance must be in writing, accompanied by the necessary fee and filed with the Clerk.

[fol. 24] IN THE DISTRICT COURT OF APPEAL OF THE STATE  
CALIFORNIA IN AND FOR THE FOURTH APPELLATE DISTRICT

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF PROHIBITION—Filed  
July 3, 1952

By the Court:

The Petition for Writ of Prohibition is denied.

[File endorsement omitted.]

Dated July 3, 1952.

Barnard, P. J.

[fol. 25] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR HEAR-  
ING—Filed June 27, 1952

## I

An action for partition of a vessel seeking the appointment; of a receiver and an order decreeing the sale of the vessel and a ratable division of the proceeds is in action in which the state courts have no jurisdiction, but that the jurisdiction of such an action lies in the Admiralty Court of the United States.

Fischer v. Carey, et al, 173 Cal., 185  
I Benedict on Admiralty, 157-58, Sec. 74

## II

An action for partition is an action in rem against the vessel, and proper jurisdiction of such an action is therefore in the Admiralty Courts of the United States, and not in the state courts.

Fischer v. Carey, et al, 173 Cal., 185  
Higgins v. Eva, 204 Cal., 231.

[fol. 26]

III

A vessel belonging to several persons not partners, in which the several interested persons differ as to its use or repair, is a controversy which may be determined by any court of competent jurisdiction.

Harbors and Navigation Code, Sec. 403.

Levenson, Levenson & Block. By Eli H. Levenson,  
Attorneys for Petitioner.

[fol. 27]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

MADRUGA

v.

SUPERIOR COURT, SAN DIEGO COUNTY.

ORDER GRANTING HEARING AFTER JUDGMENT BY DISTRICT  
COURT OF APPEAL—Filed August 28, 1952

Petitioner's application for hearing granted and cause transferred to this Court.

Let an alternative writ of prohibition issue, to be heard before this Court at its courtroom in *Los Angeles*, on *October 2nd 1952*, at 9:30 A. M.

The alternative writ is to be issued served and filed on or before *September 3, 1952*.

The written return to the writ is to be served and filed on or before *September 15, 1952*.

Gibson, Chief Justice; Shenk, Justice; Carter, Justice; Traynor, Justice; Schauer, Justice; Spence, Justice.

[fol. 28]

[File endorsement omitted]

## IN SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

No. LA 22511

ALTERNATIVE WRIT OF PROHIBITION—Filed September 4, 1952

The people of the State of California, to the Superior Court of the State of California, in and for the County of San Diego, Greetings:

Whereas, Manuel S. Madruga did represent to this court by his Petition for Hearing and by his verified Petition for a Writ of Prohibition to the District Court of Appeal, Fourth Appellate District, a copy of which was attached to said Petition for hearing in this court, that the Superior Court of the State of California, in and for the county of San Diego, threatens to and intends to, and will unless restrained and prohibited from so doing, entertain, pass upon, proceed with, hear and try the action as prayed for in the complaint of the plaintiffs, Edward X. Madruga, Joe B. Silveira, Anthony D. Madruga, Joseph Madruga, Joseph Bogdanovich, Nicholas Trutanich, John Trippa, and Vincent Gann, on file in proceeding No. 173337, now pending in the Superior Court of the State of California, in and for the County of San Diego, as will more fully appear from said petition of Manuel S. Madruga, on file with said District [fol. 29] Court of Appeal, Fourth Appellate District and transferred to this court, and threatens to, and may cause the partition of a certificated vessel, and cause to have said vessel sold and the proceeds of said sale partitioned between the parties, according to their respective interests in said vessel, and

Whereas, it has been further made to appear that said District Court of Appeal, Fourth Appellate District, did, on the 3rd day of July, 1952, deny the petition of said Manuel S. Madruga for a Writ of Prohibition and a Petition for Hearing thereafter filed with this court, which Petition has been granted.

Nevertheless you, the said Superior Court of the State of California, in and for the County of San Diego, well knowing

the premises, have proceeded and are proceeding against the laws and customs of our said state and to the manifest damage, prejudice and grievance of said Manuel S. Madruga, the petitioner herein, and to the property and property rights of said Manuel S. Madruga.

We therefore do command you, the said Superior Court of the State of California, in and for the County of San Diego, that you desist and refrain from taking any further proceedings based upon the allegations of the plaintiffs, Edward X. Madruga, Joe B. Silveira, Anthony D. Madruga, Joseph Madruga, Joseph Bogdanovich, Nicholas Trutanich, John Trippa, and Vincent Gann, in proceeding No. 173337, now pending in the Superior Court of the State of California, in and for the County of San Diego, and that you do not hear, determine, pass upon, try or decide any proceeding based upon the allegations of said complaint or any relief prayed for in said complaint until further order of this court, and that you, the Superior Court of the State of California, in and for the County of San Diego, show cause before our Supreme Court of the State of California in Bank, on the 2nd day of October, 1952, at the hour of 9:30 o'clock A. M. of said day, in the Courtroom of said Supreme [fol. 36] Court of the State of California in the State Building in the City and County of Los Angeles, State of California, why you should not be absolutely and forever restrained and prohibited from taking any further or other proceedings upon the allegations or prayer of the complaint of said Edward X. Madruga, Joe B. Silveira, Anthony D. Madruga, Joseph Madruga, Joseph Bogdanovich, Nicholas Trutanich, John Trippa, and Vincent Gann, on file in said proceeding No. 173337, now pending in the Superior Court of the State of California, in and for the County of San Diego, and have you then and there this Writ.

It is further ordered that the written return to this Writ be served and filed on or before the 15th day of September, 1952.

Witness the honorable Phil S. Gibson, Chief Justice of the Supreme Court of the State of California.

Attest my hand and the seal of said court, this 2nd day of September, 1952.

William I. Sullivan, Clerk of the Supreme Court. By  
Henry P. Crabtree, Deputy.

[fol. 31] [File endorsement omitted]

IN SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

RETURN TO ALTERNATIVE WRIT OF PROHIBITION BY WAY OF  
DEMURRER—Filed September 11, 1952

Come now respondent and the real parties in interest in the above-entitled matter, and do hereby make Return to the Alternative Writ of Prohibition heretofore issued by this Court by way of demurrer:

I

That neither the Petition for Writ of Prohibition filed in the District Court of Appeal in and for the Fourth Appellate District nor said Alternative Writ of Prohibition state facts showing that said petitioner is entitled to a Writ of Prohibition.

Luce, Forward, Kunzel & Scripps. By Fred Kunzel,  
Attorneys for Respondent and Real Parties in  
Interest.

[fol. 32] POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

The pending action in the Superior Court was filed to partition the vessel "Liberty" by a majority of the owners of the vessel pursuant to Sections 752 to 801.15 of the California Code of Civil Procedure. The majority of the owners consists of all the owners with the exception of petitioner herein, who owns a 15% interest in the vessel.

The petition for writ of prohibition herein is sought upon the basis that a State Court does not have jurisdiction to partition a vessel. In support of this contention petitioner cites the case of *Fischer v. Carey*, 173 Cal. 185.

In the above cited case the appeal was from an order of the trial court appointing a receiver to operate the vessel upon complaint of minority owners of the vessel. The order of the trial court appealed from appears at page 186 of the decision as follows:

"to operate said vessel if it appears in the judgment of said receiver such operation can be done at a profit

and to preserve the vessel, her earnings and appurtenances until the further order of the court."

The complaint prayed for an accounting, for the appointment of a receiver, and for an order decreasing the sale of the vessel and a division of the proceeds ratably amongst the part owners. The Supreme Court reversed the order appointing the receiver and in so doing, the Court stated at page 159:

"... that the power of a state court does not go to the length here exercised, of appointing a receiver and decreasing a sale because of the differences over the management of the vessel which have sprung up between the legal owners of that vessel."

In our opinion the court reached the proper conclusion. Statements made by the court relative to partition are pure dictum. Inasmuch as the trial court made no order for partition. The court merely followed the ancient admiralty rule that the courts will not, upon petition of a minority owner, [Vol. 25] interfere with the management, control or operation of a vessel. The Admiralty Courts, so as to not allow a circumvention of the above rule, also have refused to partition a vessel on the petition of a minority owner and have stated that they would not partition except where the interests of the vessel are equal. The reason for this rule is that where the interests are equal and there is dissension between equal owners the vessel cannot be operated and therefore the court will partition to keep the vessel in operation.

"Orders of partition or sale, for the purpose of partition, are also within the power of the American admiralty as they are of the European maritime courts, such jurisdiction being exercised only as between equal interests. A decree of partition or liquidation cannot issue merely upon a libel *in rem*; it is essential that the co-owner be also sued and served in personam."

1 Benedict on Admiralty at page 158.

*The Red Wing*, 10 Fed. 2d 389:

"Inasmuch as Kordich and respondents are not co-partners or co-owners in the Red Wing in equal shares,

the subject-matter of this proceeding is not within the purview of admiralty, for the rule is generally and uniformly established by the Supreme Court that the jurisdiction of courts of admiralty in cases of part owners having unequal interests is not and never has been applied to direct a sale upon any dispute as to the trade and navigation of the ship. *The Steamboat Orleans*, 11 Pet. 182, 9 L. Ed. 677; *Coyne v. Caples* (D.C.) 8 F. 638."

The Court in the case of *Fischer v. Carey*, in its stated reasons for the decision, fell in error in three particulars; one, in the assumption that a partition action is in rem; second, that all actions pertaining to a vessel are in rem; and third, that all admiralty actions are in rem.

A partition action is not an action in rem unless it is a partition of real property and brought within the purview of Section 749.1 of the California Code of Civil Procedure.

40 Am. Jr. 112, Sec. 134.

*"Unknown Persons.*—The statutes of many of the states authorize the process in suits for partition to be directed to unknown owners or to all owners and claimants, known and unknown, in certain contingencies therein designated, and to be served by the publication [fol. 34] thereof or of some notice requiring all persons to appear and disclose and assert their claims to the property. Wherever such statutes exist and have been complied with, the proceeding becomes one in rem, and is conclusive against all persons irrespective of the character or extent of their title."

An action in rem is where the object of the action is to determine the rights of the world in certain property. The distinction between an action in rem and an action in personam against a vessel is well stated by Judge Hughes in the case of *F. T. Rounds v. Cloverport Foundry & Machine Company*, 237 U. S. 203 (305 S. Ct. 596; 59 L. Ed. 966), wherein it is stated:

"As the last point is plainly well taken, it is unnecessary to go further. It is well settled that in an action in personam the state court has jurisdiction to issue an

ancillary attachment against the vessel, and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transgressed its authority. The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself seized and proceeded on as the defendant, and is judged and satisfied accordingly. By virtue of dominion over the thing all persons interest in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes, and not merely the title or interest of a personal defendant."

See also *United States of Mexico v. Rack*, 118 U. S. 41 at page 49.

It has never been held that a state court or an admiralty court, for that matter, lacked jurisdiction to partition a vessel upon a request by the majority of the owners. Partition actions are favored in law and as such there exists no valid reason why an owner of a 15% interest in the vessel should be able to keep the owners of an 85% interest in the vessel from selling it if they feel that the reasons for the sale are valid.

#### 40 Am. Jr. 5, Sec. 4.

**Nature and Object.**—Partition is a right much favored, upon the ground that it not only secures peace, but promotes industry and enterprise. The rule of the [fol. 35] civil as of the common law that no one should be compelled to hold property in common with another grew out of a purpose to prevent strife and disagreement. Additional reasons are found, however, in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding. Partition proceedings enable those who own property as joint tenants, coparceners, or tenants in common, to put an end to the tenancy so as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and after partition, each has the right to enjoy his estate without

supervision, let, or hindrance from the other. Unless this can be accomplished, then the joint estate ought to be sold, and the proceeds divided. Courts should be, and are, adverse to any rule which will compel unwilling persons to use their property in common."

Dated this 10th day of September, 1952.

Respectfully submitted, Luce, Forward, Kunzel & Scripps. By Fred Kunzel, Attorneys of Respondent.

[fol. 36] [File endorsement omitted]

IN SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ADDITIONAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION  
—Filed October 9, 1952

Pursuant to permission heretofore granted by this Honorable Court, petitioner submits the following additional points and authorities in support of his petition on file herein, and in answer to the Return and Demurrer of Respondent respectfully submits:

### Statement of Facts

Reference is made to the preliminary statement heretofore set forth in the petition on file herein. Briefly stated, however, the question involved appears to be:

Do the courts of the State of California have jurisdiction to order a sale of a certificated vessel and to order the proceeds of said sale partitioned between the parties according to their respective interests?

[fol. 37]

### I

#### ADMIRALTY JURISDICTION UNDER U. S. MARITIME LAW

It is to be noted that California, by Code, recognizes the jurisdiction of the admiralty courts in cases involving co-

owners and has failed to reserve jurisdiction to our state courts in such cases.

"If a vessel belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any court of competent jurisdiction."

*Harbors and Navigation Code, Sec. 403.*

Section 9 of the Judiciary Act of 1789 and later statutes reenacting the same provision provides that the federal district courts shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

This provision was amended in 1949 and now reads as follows:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 546, 62 Stat. 931, amended May 24, 1949, c. 129, 479, 63 Stat. 101."

*TU. 26-USCA, Ch. 85, Sec. 1553.*

As the historical note to this section points out, the 1949 amendment, having to do with the "saving to suitors" clause, was changed by substituting the words "any other remedy to which he is otherwise entitled" for the words "the right of a common-law remedy where the common law [fol. 35] is competent to give it." The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity.

The question therefor presented is whether an action to partition a certificated vessel is an action that was cognizable at common law.

On three different occasions California, speaking through this Honorable Court, has passed upon the particular types of action presented to it for consideration and has determined in each case whether the particular action was one cognizable only in admiralty or whether at common law the action was recognized so as to allow the state court to take jurisdiction of the subject matter.

The first case to be presented to this Court passed upon the specific question as to whether the state court had jurisdiction of the subject matter of an action wherein the relief prayed for was the sale and ratable partition of proceeds. Thus, in the case of *Fischer v. Corey*, 173, Cal. 185 (1916) the court had before it an action wherein the plaintiffs, as minority owners of a vessel, commenced an action in equity because of the dissatisfaction of the employment of the vessel by the majority owners. The complaint prayed for an accounting, for the appointment of a receiver, and *for an order decreeing the sale of the vessel and a division of the proceeds ratably amongst the part-owners*. This Court made a critical examination of all of the authorities, including many state authorities holding to the contrary, and discussed with particularity the decisions of other state courts and language found in some of the federal decisions in which the particular state courts have taken it upon themselves to assume jurisdiction of similar actions, and concludes that the courts of the State of California, notwithstanding the authorities to the contrary, cannot assume jurisdiction of an action to partition a vessel.

*Fischer v. Corey*, 173 Cal. 185 (1916).

[fol. 39]. There is lengthy discussion in the *Fischer* case (*supra*) and in all of the authorities cited in that case to the effect that the admiralty rule applied will prevent a partition of a vessel where the interests are unequal. However, as pointed out in the *Fischer* case (*supra*), the federal cases examined, without exception, show that the federal courts have entertained jurisdiction of the subject matter of the action and that the judgments in each case were judgments upon the merits, denying the particular remedy sought. In other words, a distinction is made between the jurisdiction of the subject matter and the admiralty rule which is applied in each case of the cases.

The next case to come before this Honorable Court was the case of *Higgins v. Ede*, 204 Cal. 231 (1928). This was a case in which a vessel owned by co-owners as tenants in common became wrecked in the Gulf of California. The vessel was salvaged and repaired by the respondent and others as majority owners. The appellant, a minority owner, refused to pay any portion of the costs of salvage, and the action involved the rights of the parties as the result of the appellant's failure or refusal to pay his proportionate share of such costs. The respondent sought to establish a contractual relation with the appellant in which it was alleged that the appellant had agreed to either pay his proportionate cost or sell his interest to those owners who had paid their shares. It appears that the action was intended as one to compel appellant to sell his interest in the vessel to respondent and to the majority owners. This Court, on the authority of *Fischer v. Carey* (supra) held that the relief prayed for was in rem and not a common law remedy, and that the jurisdiction for the relief prayed for was vested exclusively in the United States District Court. The court, after an examination of the factual situation presented, goes further by saying that if the action be construed to be an [fol 40] action for the recovery of money, the proof falls short of the claim by respondents. The judgment of the lower court was thereupon reversed.

The third case to come before this Honorable Court was that of *Moore v. Purse Seine Net*, 18 Cal. (2d) 835 (1941). This case involved the right of the State of California to seize a fishing net in use on a fishing boat operating in navigable waters of the Pacific Ocean. The seizure was made under statutes of the State of California providing for the seizure and forfeiture of a vessel using appliances in violation of the Fish and Game Code. This Court examines the Judiciary Act and traces the history of admiralty jurisdiction in connection with cases of seizure back to the English common law and statutes. The sole question in the *Moore v. Purse Seine Net* case (supra) is stated at page 838 of the decision:

"It is therefore necessary to determine whether this forfeiture proceeding (underlining ours) by the state

is the type of action that was cognizable in a common law court."

*Moore v. Purse Seine Net*, 18 Cal. (2d) 835 (1941).

The court concludes that this type of action, namely, one of seizure, was an action that historically was cognizable in the court of common law and hence the state courts had jurisdiction. It is submitted, therefore, that the *Moore v. Purse Seine Net* case was decided upon the principle of the nature of the particular action before it and cannot be considered as authority for the proposition that the courts of the State of California have jurisdiction in all cases involving vessels. The case must therefore be limited in its scope to an action of forfeiture by the state, especially in view of the language of the court at page 838, which reads as follows:

"The fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (cases cited), does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of [fol. 41] action is a traditional common law remedy."

*Moore v. Purse Seine Net*, 18 Cal. (2d) 835 (1941).

The court makes the further observation at page 842 indicating the limited scope of the case:

"It is therefore clear that the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act."

*Moore v. Purse Seine Net*, 18 Cal. (2d) 835 (1941).

It is to be noted that in the *Moore v. Purse Seine Net* case (supra) neither the *Fischer v. Carey* or *Higgins v. Eva* cases were discussed.

Respondent in this proceeding criticizes the case of *Fischer v. Carey*, stating that the court fell in error in three particulars: (1) In the assumption that a partition

action is in rem; (2) that all actions pertaining to a vessel are in rem; and (3) that all admiralty actions are in rem. To these criticisms we cannot agree. The court in that case carefully considered the relief prayed for and was considering the authorities in light of the prayer requiring the appointment of a receiver and a sale of the vessel with ratable partition of the proceeds. The court specifically states that no question arises over the jurisdiction of equity; for example, to enforce a lien, a contract for sale, or to a decree for an accounting as such. In the *Fischer* case the court even suggests that the state courts may retain jurisdiction of the action insofar as it addresses itself to the equitable consideration of settling accounts. But in unequivocal language, the court states as follows:

"But we hold that the power of a state court does not go to the length here exercised, of appointing a receiver and decreeing a sale because of the differences over the management of the vessel . . ."

*Fischer v. Carey*, 173 Cal. 185 (1916), at p. 198.

It is therefore submitted that the California cases are each consistent with reference to the particular actions submitted for consideration, and that the *Fischer v. Carey* case is determinative of the question here involved, to wit: That the Superior Court of the State of California has no jurisdiction of the subject matter of the present action.

Respectfully submitted, Levenson, Levenson & Block.  
By (S) Eli H. Levenson, Attorneys for Petitioner.

[fol. 43]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

L. A. 32511

MANUEL S. MADEUGA, Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR  
THE COUNTY OF SAN DIEGO, Respondent

OPINION—FILED December 17, 1952

Co-owners representing eighty-five per cent of the interest in the Oil Screw Vessel Liberty, Official No. 256,332, docked at the City of San Diego, filed in the superior court in San Diego County a complaint for partition by sale of the vessel and distribution of the proceeds to all the co-owners. Manuel S. Madruga, the owner of the remaining fifteen per cent interest, named as defendant in the complaint, filed a demurrer stating among other grounds that the superior court had no jurisdiction of the subject matter and that exclusive jurisdiction was in the federal court. The respondent court overruled the demurrer and announced that it would proceed by requiring the defendant to answer the complaint. Thereupon the minority owner and defendant in the partition proceeding applied for the writ of prohibition directing the respondent court to refrain [fol. 44] from further proceedings. The alternative writ issued. The jurisdictional question is submitted on the petition and the demurrer thereto.

The action in the respondent court is one for partition by sale of the vessel as personal property and for distribution of the proceeds to the several co-owners in accordance with their stated individual interests, pursuant to sections 752a et seq. of the Code of Civil Procedure. It is alleged that there are no liens or encumbrances against the vessel. Partnership and accounting problems are not involved.

It is the petitioner's position that the jurisdictional question has been determined favorably to his contention by this court's decision in *Fischer v. Carey*, 1916, 173 Cal. 185.

The respondent seeks to distinguish that case as one involving minority owners and contends that the state has concurrent jurisdiction with the federal court by virtue of the saving clause in the federal Judicial Code.

Section 2 of Article III of the United States Constitution provides that the judicial power of the United States courts shall extend "to all cases of admiralty and maritime jurisdiction." The Act of Sept. 24, 1789, Sec. 9, c. 20 (1 Stat. at L. 73, 77, Jud. Code, Sec. 24 (3), 28 U. S. [fol. 45] Code 41 (3)), provided that the United States District courts should have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." By decision this saving clause has been deemed to refer to the existing right to proceed against parties in personam, as in contract or tort. (See *North Pac. Steamship Co. v. Ind. Acc. Comm.*, 1917, 174 Cal. 346, workmen's compensation; *Higgins v. Eva*, 1928, 204 Cal. 231, action for proportionate share of cost of salvaging and repairing the vessel; *United States of Mexico v. Rask*, 1931, 118 Cal. App. 21, lien for repairs.) But it has been said that the right to proceed in rem is the distinctive remedy of admiralty and that neither Congress nor the state can confer jurisdiction upon the state courts to proceed in rem. (See *Benedict on Admiralty*, pp. 33 et seq.) It has been held that the proceeding to partition (licitation or sale) is one in rem, although also in personam by the necessity of requiring all co-owners to be joined. *Tucci v. Arbusto*, S. D. N. Y. 56 Fed. 2d. 666.)

Section 41 (3) of the Judicial Code was subsequently repealed and in 1942 section 1333 (28 U. S. C.) was substituted. [fol. 46] In 1949 Congress amended section 1333 (63 Stat. 101) to provide that the district courts have original jurisdiction exclusive of the state courts of any civil case of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled." Thus at this time there is no necessity to resolve the question whether the reservation of the original section referred only to remedies known to the common law. The question is whether there is now available to co-owners of a vessel a partition proceeding in the state courts.

In *Fischer v. Carey*, *supra*, (173 Cal. 185) decided in 1916, it was concluded that the state court did not have concurrent jurisdiction in a partition proceeding commenced by minority co-owners. There the minority owners sought an accounting, the appointment of a receiver to operate the vessel, the sale of the vessel and a division of the proceeds. The trial court appointed a receiver to take possession of and to operate the vessel, and to preserve her and her earnings until the further order of the court. On the appeal the defendants' contention that the controversy was cognizable exclusively in the federal district court prevailed. This court held that on the facts equitable relief by way of accounting was merely incidental to the principal relief sought, [fol. 47] namely, the sale of the ship and a distribution of the proceeds; that it was essentially a proceeding in rem and thereby invaded the exclusive admiralty jurisdiction of the federal court. It was declared that admiralty had the sole power to say when and under what circumstances a vessel should be sold. It was pointed out that the federal policy controlling the exercise of that jurisdiction was to keep the vessel in employment and to that end permit the majority to determine the use or employment of the ship, since the remedy by stipulation and bond was given to the dissenting minority; that in admiralty usually partition was granted in a controversy between equal owners, but denied on the application of minority owners. In treating of a possible refusal of the majority to employ the vessel, the court pointed to language in *The Seneca*, 3 Wall. Jr. 395 (Fed. Case No. 12,670, involving equal owners), declaring that since the minority could not compel the majority to employ the vessel, the majority should not be permitted to keep the vessel idle to the injury of the minority and to the public detriment, hence the ship could be valued and sold. Reference was also made to *Story on Partnership*, p. 611 et seq., which was quoted to the effect that the general maritime law authorized a sale in admiralty in all cases where by reason of disagreement among the co-owners, the ship could not be employed whether or not there was an equality [fol. 48] in the dissenting interest. After an extensive review of decisional and text authority, it was said that the many declarations respecting the power in admiralty, whether on application of majority, equal or minority own-

ers, did not preclude a determination that jurisdiction resided in admiralty to entertain cases respecting sale, but that such declarations were to be taken as specifying when and how, in conformity with applicable policy and existing remedies, the jurisdiction would be exercised. (See and cf 48 Am. p. 78, sec. 106.)

Decisional law that admiralty has jurisdiction in partition by the sale of a vessel does not necessarily determine that the State does not have concurrent jurisdiction when the remedy therefor exists. On the contrary there is authority to the effect that the state has concurrent jurisdiction in equity to partition a vessel by sale when there is disagreement among the co-owners as to how the ship should be employed. The leading cases (*Andrews v. Betts*, 1876, 15 N. Y. Sup. Ct. Rep. (8 Hun.) 322), and others following it were treated in *Fischer v. Carey*, supra, 173 Cal. at p. 192 et seq. In *Andrews v. Betts* unequal owners sought partition and sale of a propeller operated under acts of Congress on the Hudson River. It was decided that concurrent state jurisdiction existed under state equity powers (as distinct [fol. 49] from any common law remedy) to decree partition and sale. That case was rejected in *Fischer v. Carey* because the common law provided no such remedy and partition in equity was therefore not a remedy reserved to suitors by the federal statute.

The answer here is resolved by the 1949 amendment to the Judicial Code saving to suitors all other remedies to which they are "otherwise entitled." The amendment clarifies the intent to preserve the state concurrent jurisdiction where a remedy is provided under state law which is available to the plaintiffs. In *Jordine v. Walling* (Nov. 1950) 185 Fed. 2d 662, it was recognized that amended section 1333 authorized state courts to entertain suits by seamen for maintenance and cure. It was pointed out that section 1333 was amended to conform with the decisions (as in *Andrews v. Betts*), to the effect that any competent court having jurisdiction of the parties was authorized to entertain a civil action for the enforcement of a right conferred by the maritime law where adequate relief might be given in the action. It follows that the state court is competent to decree ownership interests, sale of a vessel, and distribution of the proceeds, at least where the granting of the relief does not con-

dict with the federal maritime policy that the majority owners determine the use and employment of the vessel. Therefore the respondent court has power to proceed on [fol. 50] the petition of the majority owners here.

The peremptory writ is denied and the alternative writ is discharged.

Shank J.

We concur: Gibson, C. J.; Edmonds, J.; Carter, J.; Schauer, J.; Spencer, J.

I concur in judgment:

Traynor, J.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1952

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITIONER FOR WRIT OF HABEAS CORPUS—March 5, 1953

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of habeas corpus in the above-entitled cause be, and the same is hereby, extended to including April 17, 1953.

W. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 5th day of March, 1953.

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IN THE  
**Supreme Court of the United States**

October Term, 1952

No. \_\_\_\_\_

**MANUEL S. MADRUGA,**

*Petitioner,*

*vs.*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND  
FOR THE COUNTY OF SAN DIEGO,**

*Respondent.*

**Petition of Manuel S. Madruga for Writ of Certiorari  
to the Supreme Court of the State of California.**

*To the Honorable Fred M. Vinson, Chief Justice of the  
United States and the Associate Justices of the Su-  
preme Court of the United States:*

Petitioner herein prays that a Writ of Certiorari issue to review the opinion and decision of the Supreme Court of the State of California in the case entitled: Manuel S. Madruga, Petitioner v. Superior Court of the State of California, in and for the County of San Diego, Respondent, L. A. No. 22511, entered December 17, 1952.\*

\*By order of this Court time to file this petition was extended to April 17, 1953 [R. 33].

### Opinion of Court Below.

The opinion and decision of the Supreme Court of the State of California, being the court of last resort in the State of California wherein the questions involved in this petition were resolved, L. A. No. 22511, will be found in 40 A. C. 65, 251 P. 2d 1 [R. 29].

### Jurisdictional Statement.

Supreme Court jurisdiction arises:

1. Under Title 28, U. S. C., Section 344(b), Judicial Code, Section 237(b); and
2. Under Title 28, U. S. C., Section 1333 (63 Stats. 101).

### Questions Presented.

1. Do courts of the several states have jurisdiction to partition a vessel certificated under the maritime laws of the United States, or is such jurisdiction exclusive in the District Courts of the United States?

2. Do the state courts and the courts of the United States have concurrent jurisdiction in a proceeding to partition a vessel certificated under the maritime laws of the United States by reason of the 1949 Amendment to Title 28, U. S. C., Section 1333 (63 Stats. 101)?

3. Is the remedy provided by the partition statutes of the State of California sufficient to allow the state courts of California to partition a vessel certificated under the maritime laws of the United States?

### Statutes Involved.

1. The application and interpretation of Title 28, U. S. C., Section 1333 (63 Stats. 101).
2. California Code of Civil Procedure, Section 752a.
3. California Harbors and Navigation Code, Section 403.

### Statement of Facts.

This action was originally instituted by the majority owners of a certificated vessel of the United States to partition said vessel in the Superior Court of the State of California, in and for the County of San Diego [R. 1]. The action was instituted under the provisions of Section 752a of the Code of Civil Procedure of the State of California, which reads as follows:

"Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action."

*California Code of Civil Procedure, Section 752a.*

The defendant in that action, and the petitioner herein, one of the minority owners of the said vessel, entered a demurrer [R. 2] to the complaint on the grounds that the Superior Court of the State of California did not have jurisdiction to cause a partition of said vessel and that the United States District Court sitting in admiralty was

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the only and proper court having jurisdiction of the subject matter. Said demurrer was overruled [R. 2] and petitioner applied to the District Court of Appeal for the State of California for a Writ of Prohibition [R. 11], which writ was denied on the 3rd day of July, 1952 [R. 15]. Thereafter, petitioner sought a hearing in the Supreme Court of the State of California [R. 9], which application for a hearing was granted and an Alternative Writ of Prohibition issued on the 2nd day of September, 1952 [R. 16-17]. Thereafter, the Supreme Court of the State of California denied the peremptory writ and discharged the alternative writ [R. 33]. From the decision and opinion of the said Supreme Court of the State of California petitioner seeks this Writ of Certiorari.

### Specification of Errors.

1. The Superior Court of the State of California erred in accepting jurisdiction of the subject matter of a partition suit to partition a vessel certificated under the maritime laws of the United States.

2. The Supreme Court of the State of California erred in holding that the state courts of California had jurisdiction of the subject matter of a partition suit to partition a vessel certificated under the maritime laws of the United States.

### Reasons for Granting Certiorari.

1. That the question involved concerns the application of federal statutes concerning the maritime and admiralty jurisdiction of the courts of the United States, and that the Supreme Court of the State of California has decided a federal question of substance not theretofore determined

by this court, or has decided it in a way probably not in accord with applicable decisions of this Court.

2. That the 1949 Amendment to Title 28, U. S. C., Section 1333 (63 Stats. 101), raises the federal question as to whether the saving clause in said section, as amended, makes available to co-owners of a vessel a partition proceeding in the state courts, or whether the saving clause in said section, as amended, refers to remedies known to the common law.

3. That there is no uniformity of decision among the high courts of the several states of the United States or among the federal courts of the United States which have had occasion to pass upon the question involved prior to the 1949 Amendment of Title 28, U. S. C., Section 1333 (63 Stats. 101).

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of California to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and, that the decision and opinion of the said Supreme Court of the State of California be reversed by this Court, and for such other further relief as to this Court may seem proper.

✓ Respectfully submitted,

THOMAS M. HAMILTON,

*Attorney for Petitioner.*

*Of Counsel:*

LEVENSON, LEVENSON & BLOCK, and  
McINNIS & HAMILTON.

# Supreme Court of the United States

October Term, 1952

No. \_\_\_\_\_

**MANUEL S. MADRUGA,**

*Petitioner,*

*vs.*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND  
FOR THE COUNTY OF SAN DIEGO,**

*Respondent.*

**Manuel S. Madruga's Brief in Support of Petition for  
Writ of Certiorari to the Supreme Court of the  
State of California.**

The petition which accompanies this brief is incorporated herein by reference. It contains:

1. Opinion of Court Below.
2. Jurisdictional Statement.
3. Questions Presented.
4. Statement of Facts.
5. Specification of Errors.
6. Reasons for Granting Certiorari.

## ARGUMENT.

### Summary of the Argument.

POINT A. TITLE 28, U. S. C. SECTION 1333 (41 STAT. 931) DOES NOT ENLARGE THE JURISDICTION OF STATE COURTS SO AS TO CREATE CONCURRENT JURISDICTION ON THE UNITED STATES COURTS AND THE COURTS OF THE SEVERAL STATES OF THE UNITED STATES IN ACTIONS TO PARTITION VESSELS CERTIFICATED UNDER MARITIME OR ADMIRALTY LAWS OF THE UNITED STATES.

POINT B. AN ACTION TO PARTITION A VESSEL CERTIFICATED UNDER THE MARITIME LAWS OF THE UNITED STATES IS AN ACTION *IN REM* AND THEREFORE WITHIN THE EXCLUSIVE JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES SITTING IN ADMIRALTY.

POINT C. EXCLUSIVE JURISDICTION IN THE DISTRICT COURTS OF THE UNITED STATES SITTING IN ADMIRALTY IN ACTIONS FOR THE PARTITION OF VESSELS CERTIFICATED UNDER THE MARITIME LAWS OF THE UNITED STATES WILL INSURE UNIFORMITY IN THE APPLICATION OF SUBSTANTIVE RULES OF ADMIRALTY LAW.

### POINT A.

Title 28, U. S. C., Section 1333 (41 Stat. 101) Does Not Enlarge the Jurisdiction of State Courts so as to Create Concurrent Jurisdiction on the United States Courts and the Courts of the Several States of the United States in Actions to Partition Vessels Certificated Under Maritime or Admiralty Laws of the United States.

In order to clarify the several issues arising out of this litigation, it is suggested that several observations be made.

First, this action was originally instituted in the Superior Court of the State of California, in and for the

County of San Diego [R. 1] to partition a vessel certificated under the maritime laws of the United States. It appears that the home port of said vessel is San Diego, California, and although the complaint in the original action is silent, said vessel is a tug vessel operating in international waters of the Pacific Ocean.

Second, the action was instituted by the majority owners in interest as against the defendant, who is the petitioner herein and who is the owner of a fifteen per cent (15%) interest [R. 1].

Third, the original complaint is silent as to the existence of any dispute among the owners, either in the operation of the vessel, the management thereof, or any other matter.

The action was instituted under the partition statutes of the State of California and particularly Section 752a of the Code of Civil Procedure of the State of California, which reads as follows:

"Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action."

*California Code of Civil Procedure, Section 752a.*

The code section involved relates to the partition of any personal property and it is therefore assumed by the plaintiff in the original action that any personal property

would include a vessel certificated under the maritime laws of the United States. That this assumption is incorrect is indicated by a provision to be found in the Harbors and Navigation Code of the State of California, Section 403, which reads as follows:

"If a vessel belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any court of competent jurisdiction."

*California Harbors and Navigation Code, Section 403.*

It is to be noted that the California Code of Civil Procedure, Section 752a, allows for the partition between co-owners of personalty without regard to the existence of a dispute among the owners as to any matters concerning the personalty involved. It appears to be an automatic process. This observation is important in view of the discussion of the substantive rules of admiralty which will later be considered.

Section 2 of Article III of the United States Constitution defines the power of the United States courts, and we find that such power extends—

" . . . to all cases affecting ambassadors, other public ministers and counsels; . . . to all cases of admiralty and maritime jurisdiction; . . . "

*United States Constitution, Article III, Section 2.*

From the constitutional provision there was enacted into the laws of the United States Section 9 of the Judiciary

Act of 1789. See Act of September 24, 1789, Chapter 20 (1 Stat. at L. 73, 77, Jud. Code, Sec. 24(3), 28 U. S. C., Sec. 41(3)).

Section 41(3) of the Judicial Code was subsequently repealed, and in 1948 Title 28, U. S. C., Section 1333 was substituted. This section contained substantially the same language of the saving clause, to-wit: "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

In 1949, Title 28, U. S. C., Section 1333 (63 Stat. 101), was amended to provide that the District Courts (of the United States) have original jurisdiction exclusive of the state courts of any case of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled."

By reason of the 1949 Amendment, the question is raised as to whether the jurisdiction of the state courts of the several states of the United States has been extended so as to encompass actions which, although maritime in nature, were unknown to the common law.

The Supreme Court of the State of California in the present case (*Madrigal v. Superior Court* (1952), 40 A. C. 65, 251 P. 2d 1) [R. 29] has taken the position that by reason of the 1949 Amendment to Title 28, U. S. C., Section 1333 (63 Stat. 101), it is no longer required that state courts determine the availability of a common law remedy, but that it is only necessary to determine whether an action for partition, as in the present case, is

available to co-owners of a vessel in the state courts. The Court uses the following language:

"Thus at this time there is no necessity to resolve the question whether the reservation of the original section referred only to remedies known to the common law. The question is whether there is now available to coowners of a vessel a partition proceeding in the state courts."

*Madruge v. Superior Court* (1952), 40 A. C. 65 at page 67, 251 P. 2d 1 at page 2.

It is true that co-owners of personalty have available to them rights of partition under the statutes of the State of California. However, in an action to partition a vessel certificated under the maritime laws of the United States, it is questioned that the California statutes or similar statutes of other states would apply in view of the necessity of applying substantive rules of admiralty law.

The courts of the State of Washington, in the case of *Clear v. Price* (1951), 39 Wash. 2d 816, 239 P. 2d 322, discuss the precise question. In this case the Court had before it an action for partition instituted by a minority owner. The Court holds that such an action is exclusively within the jurisdiction of the United States District Court sitting in Admiralty and that the state court cannot presume upon that jurisdiction. After examining many cases, and particularly the case of *Andrews v. Betts* (1876), 15 N. Y. (Sup. Ct. Rep. 8 Hun.) 322, the Washington Court observes that the cases assume that "if equity provides such a remedy as to any personal property, it will do so as to a vessel subject to admiralty jurisdiction." The Court further observes that this assumes the very point in controversy. The Court cites, with approval, 1 Bene-

dict on Admiralty (Sixth Ed.), page 38, Section 23, to the effect that the saving clause of the Judiciary Act of the Judicial Code does not contemplate admiralty remedies in a common law court. In an examination of the authorities, the Washington Court analyzes the case of *State v. Watts*, 7 La. 440, 26 Am. Dec. 107, along with other decisions upon which it is contended that concurrent jurisdiction is saved to the state courts by operation of the saving clause of the Judicial Code. The Washington Court points out that the decision of the *Watts* case was based upon Judge Story's commentaries on the Constitution (3 Story Com. 527, et seq.). However, Judge Story in his commentaries was not speaking of actions for partition which are essentially in rem, but rather, was referring to contracts, claims and services where relief may be obtained in a suit in personam. It is further observed that the *Watts* case was primarily an action to recover on an indebtedness, a remedy which the common law is competent to give.

The Washington Court, in an examination of the case of *Andrews v. Betts* (1876), 15 N. Y. (Sup. Ct. Rep. 8 Hun.) 322, observes that the New York Court assumes that if equity provides such a remedy—partition—as to any personal property it will do so as to a vessel subject to admiralty jurisdiction. Here the Washington Court states that the assumption is the very point in controversy.

In the present case, the California Supreme Court, on the authority of *Jordine v. Walling* (1950), 185 F. 2d 662, makes the observation that Section 1333 was amended in 1949 to conform with the decision as in *Andrews v. Betts*, *supra*, to the effect that any competent court having jurisdiction of the parties is authorized to entertain a

civil action for the enforcement of a right conferred by the maritime law where adequate relief might be given in the action. In the *Jordine* case we find a situation wherein the plaintiffs sought to recover for damages under the Jones Act. One of the questions presented in the case was whether the District Court had jurisdiction to entertain a cause of action for maintenance and cure in a civil action brought and tried under Federal Rules of Civil Procedure as distinguished from a suit in admiralty brought and tried under the Admiralty Rules and Procedure; and secondly, did the District Court acquire jurisdiction because the complaint originally included a count for damages for negligence under the Jones Act.

To the interpretation by the California Court of the language of the *Jordine* case we cannot agree. The *Jordine* case points out that the saving clause did not change the original intent of Title 28, U. S. C., Section 1333, and that the "saving to suitors" clause was intended to carry into Title 28, in modern and simplified form, the similar provisions of the Judicial Code of 1911. In other words, the amendment was made for the purpose of expressing the original intent of Congress and to make it conform to Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity.

*Jordine v. Walling* (1950), 185 F. 2d 662.

That our interpretation of the *Jordine* case is sound appears from the Reviser's Note to Title 28, U. S. C., Section 1333 (63 Stats. 101), which reads as follows:

"The 'saving to suitors' clause in said sections 41(3) and 371(3) was changed by substituting the words 'any other remedy to which he is otherwise entitled' for the words 'the right of a common-law remedy

where the common law is competent to give it." The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity."

Reviser's Note to Title 28, U. S. C.; Section 1333 (63 Stat. 101).

The *Jordine* case can only be held authority for the proposition that claims for compensatory damages under the Jones Act and for maintenance and cure are separate and distinct causes of action. The claim under the Jones Act is federal in character, but that a count for maintenance and cure in a civil action tried to a jury, although arising under maritime law, is non-federal in character, and that as to such a count the state courts would have jurisdiction. The real point in issue in the *Jordine* case was the availability of a jury to the plaintiff on the several counts; that the count for maintenance and cure being of a maritime nature could only be tried to a court of admiralty without a jury, and that a civil action for damages under the Jones Act could not be tried in admiralty because of the right of the plaintiff to a jury trial.

*Jordine v. Walling* (1950), 185 F. 2d 662.

If the interpretation set forth above and as indicated by the Reviser's Note is correct, we must then look to the decisions as they existed prior to 1949 to determine whether an action for partition was available at common law.

Prior to the 1949 Amendment to Title 28, U. S. C., Section 1333, the courts were divided on the proposition.

California, in the case of *Fischer v. Carey* (1916), 173 Cal. 185, 159 Pac. 577, L. R. A. 1917A 1100, unqualifiably laid down the rule that such an action was not available at common law; that it was an action *in rem* and within the maritime and admiralty jurisdiction of the federal courts, and that the state courts of California could not entertain such an action. This holding was made after a critical examination of all the authorities. Again, as late as 1928, in the case of *Higgins v. Eva*, 204 Cal. 231, 267 Pac. 1081, the California Court had before it a case in which a vessel owned by co-owners as tenants in common became wrecked. The vessel was salvaged and repaired by respondent majority owners. The action involved the rights of the parties as a result of appellant's failure to pay his proportionate share of the costs. It appears that the action was intended as one to compel appellant, a minority owner, to sell his interest in the vessel to respondents, the majority owners. The Court, on the authority of *Fischer v. Carey*, *supra*, held that the relief prayed for was *in rem* and not a common law remedy, and that the jurisdiction for the relief prayed for was vested exclusively in the District Courts of the United States. The Court in the *Higgins* case, after an examination of the factual situation, makes the observation that if the action be construed to be an action for the recovery of money, the proof falls short of the claim by respondents.

*Higgins v. Eva*, 204 Cal. 231, 267 Pac. 1081.

In the case of *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577, L. R. A. 1917A 1100, to which reference has been made, the Court makes an exhaustive examination of the several cases, passing upon the point in question, and

refers to the cases of *Steamboat Orleans v. Phoebus* (1837), 36 U. S. (11 Pet.) 175 (9 L. Ed. 677); *Ocean Belle Case* (1872), 6 Ben. 253 (Fed. Cas. No. 10,402); *The Seneca*, 3 Wall. Jr. 395 (Fed. Cas. No. 12,670), and *Tunno v. Betrino* (Fed. Cas. No. 14,236, 24 Fed. Cas. 316). With regard to this line of cases, it must be noted that the actions were for the most part instituted by minority owners and a substantive rule of admiralty jurisdiction was involved, to-wit: the question of whether a Court of Admiralty would entertain a suit instituted by a minority interest, or whether the interests were of such a nature as to prevent courts of admiralty from giving the relief granted. The United States courts entertained the jurisdiction of the subject matter, and in each case, regardless of the language employed, the judgments were upon the merits. It would therefore appear that by their holding the courts did not mean to say that the Admiralty Court had no jurisdiction, but rather, that having jurisdiction they would not exercise it to grant the remedy or relief prayed for.

The *Fischer v. Carey* case\* makes the following observation:

"We conclude, therefore, that the reasoning of Professor Pomeroy is the most satisfactory, and that reasoning is that while equity will in general partition chattels when the chattel is a ship, this direct action against the *rem* must be brought in admiralty alone."

*Fischer v. Carey* (1916), 173 Cal. 185 at 195, 159 Pac. 577, L. R. A. 1917A 1100.

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\*This paragraph appears in the official California Report, but was apparently omitted by oversight in 159 Pac. 577.

Pomeroy's Equity Jurisprudence, Fifth Edition, has been examined closely, and although nothing is found which specifically relates to a ship or vessel, Pomeroy does make the following statement:

"The rules and proceedings which obtained at common law and by statute on the subject of partition related exclusively to real estate."

*Pomeroy's Equity Jurisprudence, Fifth Edition,*  
Section 1391, page 1019.

And again:

"However expedient the partition of chattels might appear, or however desirable it might be to the co-tenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity."

*Pomeroy's Equity Jurisprudence, Fifth Edition,*  
Section 1391, page 1020.

In 1 Benedict on Admiralty the rule is clearly stated:

"The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in a common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away. The remedy which State courts may administer, though it may be subject of regulation and modification by State statute, must be according to the general course of the common law."

1 Ben. on Admiralty, Sixth Edition, Section 23,  
page 39.

In the case of *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414, a minority owner sought an accounting, the appointment of a receiver and the sale of a vessel in the courts of Minnesota. The Court, in facing the issue and in discussing whether the remedy sought was one of the reserved common law remedies, states:

"The defendant is unquestionably right in his position that this saving is of a common-law remedy, and not merely of a remedy in a common law court. (The *Moses Taylor*, 4 Wall. 411 (18 L. Ed. 397)) and that the remedies sought in this action are not common-law remedies."

*Swain v. Knapp*, 32 Minn. 429 at 431, 21 N. W. 414 at 415.

The Minnesota Court, however, erroneously assumes jurisdiction by reasoning that since the remedies sought are not afforded in admiralty, then the subject matter is not within admiralty jurisdiction.

In the case of *Waring v. Clark* (1847), 46 U. S. (5 How.) 441, 461, 12 L. Ed. 226, 236, the Court was considering an action to recover damages for injuries arising from a collision among vessels operating on the Mississippi River. The Court makes an exhaustive examination of admiralty jurisdiction and reviews not only admiralty jurisdiction as it was known in England, but goes exhaustively into the proceedings before the Continental Congress, leading up to the constitutional provision setting forth the maritime jurisdiction of the United States courts and the Judiciary Act of 1789, and comes to the conclusion that the admiralty powers given to the courts of the United States were not limited by what were cases of admiralty jurisdiction in England, but extends far be-

yond those limitations. The Court further examines the situation with regard to actions at common law as distinguished from those in admiralty and recognizes that suits at common law are a distinct class so recognized in the Constitution and that such suits indicate a class to distinguish them from suits in equity and admiralty principally by reason of the right of trial by jury at common law as against the established rules in admiralty which preclude such a trial.

We must therefore conclude that the acceptance of jurisdiction by state courts is an infringement upon admiralty jurisdiction and an unwarranted enlargement of jurisdictional powers of the state courts; that the partitioning of a vessel certificated under the maritime or admiralty laws of the United States is one which was not known to common law; that the saving clause in Title 28, U. S. C., Section 1333, prior to the 1949 Amendment, at no time would allow for jurisdiction in state courts of admiralty matters and particularly as to matters relating to the partition of vessels, and that the 1949 Amendment was not intended to enlarge upon the jurisdiction of state courts so as to allow them to infringe upon admiralty jurisdiction. Since an action for partition of a vessel was never known to the common law, state courts cannot, as stated in 1 Benedict on Admiralty, Sixth Edition, Section 23, page 38, and used and approved in *Fischer v. Carey, supra*, confer jurisdiction upon its courts to proceed *in rem*.

## POINT B.

**An Action to Partition a Vessel Certificated Under the Maritime Laws of the United States Is an Action in Rem and Therefore Within the Exclusive Jurisdiction of the District Courts of the United States Sitting in Admiralty.**

Most of the confusion that exists among the decisions rests upon the question as to whether an action to partition a vessel was one known to the common law.

Before making such a determination, however, the question must first be answered as to whether this type of action is one *in rem* or *in personam*. That a proceeding *in rem* is the exclusive prerogative of all civil admiralty and maritime jurisdiction in the United States courts cannot be questioned.

1 Benedict on Admiralty, Sixth Edition, Section 23, pages 38 and 39;

*The Moxey Taylor* (1866), 71 U. S. (4 Wall.) 411, 18 L. Ed. 397.

The California Supreme Court in the present case, *Madriga v. Superior Court*, 40 A. C. 65 (1952), 251 P. 2d 1 [R. 29], has avoided this determination by its interpretation of Title 28, U. S. C., Section 1333, as it now reads. However, it cannot be said that the California Supreme Court has overruled its decision in the case of *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577,

L. R. A. 1917A 1100 (1916), in which case the California Court states:

"Hence, if this view be correct, a court of equity, though competent, is not empowered to give relief when such a disagreement amongst the owners shall arise, since essentially the proceeding is *in rem*, and so invades the reserved admiralty jurisdiction over the vessel. Such an equitable remedy is not amongst those which are savings to suitors by virtue of the Federal Judiciary Act."

*Fischer v. Corry*, 173 Cal. 185 at 193, 159 Pac. 577, L. R. A. 1917A 1100 (1916).

It is true that there is language in the cases indicating that a proceeding to partition (licitation or sale) is one both *in rem* and *in personam*. However, it is submitted that the *in personam* characteristics of such an action are incidental since it is necessary to join all co-owners. The action principally is one *in rem* against the vessel.

*Madruza v. Superior Court* (1952), 40 A. C. 65, 251 P. 2d 1 [R. 29];

*Cline v. Price* (1951), 239 P. 2d 322, 39 Wash. 2d 816;

*Tucci v. Arbusto* (S. D. N. Y.), 56 F. 2d 666.

From the foregoing authorities it would therefore appear that an action to partition a vessel certificated under the maritime laws of the United States is an action *in rem*, and being *in rem* is within the exclusive jurisdiction of the admiralty courts of the United States.

## POINT C.

**Exclusive Jurisdiction in the District Courts of the United States Sitting in Admiralty in Actions for the Partition of Vessels Certificated Under the Maritime Laws of the United States Will Insure Uniformity in the Application of Substantive Rules of Admiralty Law.**

Although the several cases heretofore cited have discussed the question of the effect of the saving clause of Title 28, U. S. C., Section 1333, both prior and subsequent to the 1949 Amendment, resulting in a variety of conclusions, and although the cases have rested their decisions in many instances upon the question as to whether an action to partition is one *in rem*, is *personam* or *quasi in rem*, there still remains a third consideration which seems to run through the several cases and which requires clarification.

We have heretofore made the observation that the instant case was an action instituted by the majority owners of the vessel. Many of the cases previously cited discuss the proposition as to the rights of majority and minority owners in actions to partition. In other words, the primary questions of jurisdiction appear to rest on substantive rules of admiralty. The following cases were actions instituted by minority owners:

*Fischer v. Carey* (1916), 173 Cal. 185; 159 Pac. 577, L. R. A. 1917A 1100;

*Cline v. Price* (1951), 39 Wash. 2d 816, 239 P. 2d 322;

*Andrews v. Betts* (1876), 15 N. Y. (Sup. Ct. Rep. 8 Hun.) 322;

*Steamboat Orleans v. Phoebus* (1837), 36 U. S. (11 Pet.) 175 (9 L. Ed. 677);

*Ocean Belle Case* (1872), 6 Ben. 253 (Fed. Cas. No. 10,402);

*The Seneca*, 3 Wall. Jr. 395 (Fed. Cas. No. 12,670).

As ably pointed out in the case of *Fischer v. Carey*, *supra*, admiralty may order a sale of the vessel at the instance of majority owners; that admiralty has jurisdiction to decree a sale either as to majority or minority owners cannot be questioned, but for reasons sufficient unto itself, admiralty will not exercise its power except as between equal interests. Such is the statement of Benedict on Admiralty, to-wit:

"... such jurisdiction being exercised only as between equal interests." (Citing the cases of *The Red Wing*, 1926 A. M. C. 336 (S. D. Cal.); *Steamboat Orleans v. Phoebus* (1837), 36 U. S. (11 Pet.) 175, 9 L. Ed. 677; *The Ocean Belle* (1872), 6 Ben. 253, Fed. Cas. No. 10402 (S. D. N. Y.); *Lewis v. Kinney* (1879), 3 Dill 159, Fed. Cas. No. 8325 (E. D. Mo., C. C.); *Bradshaw v. The Sylph* (1841), 2 Betts D. C. M. S. 58, Fed. Cas. No. 1791 (D. C. N. Y.).)

1 *Benedict on Admiralty*, Sixth Edition, Section 74, page 158.

The cases cited, as pointed out in *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577, L. R. A. 1917A 1100, *supra*, are cases in which the courts in admiralty have assumed jurisdiction of the subject matter but have refused the relief sought, namely, the awarding of a decree in partition at the instance of minority owners. This, we sub-

nit, is a substantive rule of admiralty law, and is not a rule conferring jurisdiction upon state courts or the United States courts sitting in admiralty. In cases where state and federal courts have been called upon to assume jurisdiction by reason of a common law remedy involved, there is language indicating that the substantive rule as announced by admiralty should be applied in the same manner as in an admiralty court, that is to say, general maritime law as developed and declared in the last analysis by this Honorable Court, or as modified from time to time by act of Congress.

*Jonsson v. Swedish American Wine* (C. A. Mass., 1950), 183 F. 2d 212.

As to substantive rules of admiralty, it is well settled:

1. A court of admiralty will not direct the sale of a vessel for the purpose of effecting partition between different owners.
2. Since the rule giving control to majority ownership cannot operate, as between equal owners, the Court will interfere out of regard for the public interest.
3. A court of admiralty will interfere upon the application of majority interest under special circumstances.

*Swain v. Keapp*, 32 Minn. 429, 2 N. W. 414.

Substantive rules of admiralty law presuppose disagreement among the co-owners in the use and operation of a vessel before considering the matter of partition. The instant case, on the other hand, proceeds under the general rules of partition law in California which do not require such disagreement. The mere fact that one is a co-owner, without reference to his interest, whether it be

minority or majority, is sufficient to allow a court of equity to decree a partition. This rule, if extended, would allow the courts of other states to assume jurisdiction of matters of admiralty jurisdiction and circumvent the acknowledged rules of admiralty as so clearly pointed out in *Cline v. Price*, wherein the Court states:

"Appellants, being minority owners, are here confronted with an admiralty principle which prevents them from obtaining, in an admiralty court, the desired sale of the vessel for partition. They seek to circumvent that obstacle by applying to the state court for relief, and point to the saving clause above referred to as permitting this recourse."

*Cline v. Price* (1951), 39 Wash. 2d 816 at 822, 239 P. 2d 322 at 326.

The precise situation exists in the instant case, for the owners, though they be majority, here seek to dispossess a minority owner in the absence of disagreement as indicated by a complete absence of recitals in the complaint [R. 1] of disagreement among the owners as to any matter concerning said vessel.

The *Cline* case further states the rule to be:

"The fundamental purpose of Art. III, Sec. 2, of the Federal Constitution was to 'preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government.' *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 440, 64 L. Ed. 834. The saving clause, 28 U. S. C. A. Sec. 1333(1), was never intended as a device whereby litigants could escape the uniform application of established principles of admiralty law, as contemplated by the Constitution. This is indicated by such de-

cisions as *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217, 37 S. Ct. 534, 61 L. Ed. 1086; *Cheleutis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171; *Knickerbocker Ice Co. v. Stewart*, *supra*; and *Washington v. W. C. Dawson & Co.*, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646, affirming 122 Wash. 572, 211 P. 724, 212 P. 1059, 31 A. L. R. 512."

*Cline v. Price* (1951), 39 Wash. 2d 816 at 822, 239 P. 2d 322 at 326.

In the case of *Cheleutis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171, we find particularly applicable language:

"... Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. . . ."

*Cheleutis v. Luckenbach S. S. Co.*, 247 U. S. 372 at 384, 38 S. Ct. 501 at 504, 62 L. Ed. 1171.

*Cline v. Price* (1951), 239 P. 2d 322, 39 Wash. 2d 816, and the *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 440, 64 L. Ed. 834, approved the language to be found in the case of *The Lottowanna*, 21 Wall. 558, 88 U. S. 558, 22 L. Ed. 654, which language is as follows:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted.

... One thing, however, is unquestionable; the Constitution must have referred to a system of law

coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistence at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

*The Lottawanna*, 21 Wall. 558 at 574, 88 U. S. 558, 22 L. Ed. 654.

It is therefore submitted, in view of the foregoing authorities, that the present state of the decisions creates an untenable situation with reference to a fundamental rule of substantive admiralty law. The Supreme Court of the State of California in the instant case, by a process of reasoning, has changed the law of the State of California. The *Cline* case, *supra*, on the other hand, appears to be entirely contrary to the California decision. Although it appears that the federal authorities cited are in disagreement, we submit that in each of the federal decisions the Court sitting in admiralty has assumed jurisdiction of the subject matter but has denied the relief sought. That this confusion must be clarified is apparent. The implication of the lack of uniformity is of utmost importance to those persons particularly in the fishing industry where it is a matter of common practice that vessels be owned in co-ownership. If the courts of California are allowed to assume jurisdiction of this type of action under its present statutes, the interests of all minority owners in

vessels will have been jeopardized to the extent that they are without the protection allowed by courts of admiralty, and this would be true both in matters of procedure as well as substantive law. They may be dispossessed and their rights prejudiced without reason and without cause. Such was not the intent of admiralty jurisdiction and cannot be said to fall in line with any announced principles of equity.

### Conclusion.

In conclusion, it is respectfully submitted that the questions stated in the petition and discussed in this brief bring before this Honorable Court matters involving fundamental issues affecting numerous owners of small interests in fishing vessels throughout the United States.

This Honorable Court is respectfully urged to grant certiorari to finally determine the questions presented, namely:

(a) Whether Title 28, U. S. C., Section 1333 (63 Stats. 101), enlarges the jurisdiction of state courts so as to give them either original jurisdiction or concurrent jurisdiction with the courts of the United States in actions to partition vessels certificated under the maritime laws of the United States.

(b) Whether an action to partition a vessel certificated under maritime laws of the United States is an action *in rem* and therefore within the exclusive jurisdiction of the District Courts of the United States sitting in admiralty.

(c) Whether exclusive jurisdiction in the District Courts of the United States sitting in admiralty in actions for the partition of vessels certificated under the maritime laws of the United States will insure uniformity in the application of substantive rules of admiralty law.

For the reasons stated and advanced, we respectfully urge this Honorable Court that a Writ of Certiorari issue under the seal of this Honorable Court, directed to the Supreme Court of the State of California to the end that this cause may be reviewed and determined by this Honorable Court and the several issues finally resolved.

Respectfully submitted,

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LEVENSON, LEVENSON & BLOCK, and  
McINNIS & HAMILTON.

Service of the within and receipt of a copy thereof is hereby admitted this \_\_\_\_\_ day of April, A. D. 1953.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1953

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No. 35

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**MANUEL S. MADRUGA, Petitioner**

v.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR  
THE COUNTY OF SAN DIEGO**

---

**BRIEF ON BEHALF OF THE RESPONDENT COURT**

---

**OPINION OF COURT BELOW**

The opinion below, *Madruga v. Superior Court of the State of California, in and for the County of San Diego*, 40 A.C. 65, 251 P. 2d 1 (1952), appears in the record at p. 29.

**JURISDICTIONAL STATEMENT**

The jurisdiction of the Supreme Court arises under Title 28, U.S.C., Section 1257(3).

## THE FEDERAL STATUTE INVOLVED

The questions presented by this case arise under Title 28, United States Code, section 1333, the pertinent portion of which reads:

"The District Court shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."<sup>1</sup>

## STATEMENT OF THE CASE

The Supreme Court of California (R. 29) accurately summarized the facts in this case as follows:

<sup>1</sup> From 1789 to 1948 the saving clause read:

"... saving to suitors the right of a common-law remedy where the common law is competent to give it." (Tit. 28, U.S.C., sec. 41 (8), 371 (3), 1940 ed.)

The 1948 revision of the Judicial Code<sup>2</sup> (Act of June 25, 1948, 62 Stat. 931) amended this clause to read:

"... saving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled."

By the Act of May 24, 1949, 63 Stat. 101, the clause was amended to its present form.

The 1948 amendment was explained by the Reviser's Note (28, U.S.C., page 1887):

"The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity . . . words 'libellant or petitioner' were substituted for 'suitors' to describe moving parties in admiralty cases."

The 1949 amendment was explained by the report of the House Committee on the Judiciary (H. Rept. No. 352, 81st Cong., 1st Sess., on H.R. 3762), as follows (p. 14):

"This section amends section 1333 (a)(1) of title 28, U.S.C., by substituting 'suitors' for 'libellant or petitioner' to conform to the language of the law in existence at the time of the enactment of the revision of title 28."

"Co-owners representing eighty-five per cent of the interest in the Oil Screw Vessel Liberty, Official No. 256,332, docked at the City of San Diego, filed in the superior court in San Diego County a complaint for partition by sale of the vessel and distribution of the proceeds to all the co-owners. Mannel S. Madruga, the owner of the remaining fifteen per cent interest, named as defendant in the complaint, filed a demurrer stating among other grounds that the superior court had no jurisdiction of the subject matter and that exclusive jurisdiction was in the federal court. The respondent court overruled the demurrer and announced that it would proceed by requiring the defendant to answer the complaint. Thereupon the minority owner and defendant in the partition proceeding applied for the writ of prohibition directing the respondent court to refrain from further proceedings. The alternative writ issued. The jurisdictional question is submitted on the petition and the demurrer thereto.

"The action in the respondent court is one for partition by sale of the vessel as personal property and for distribution of the proceeds to the several co-owners in accordance with their stated individual interests, pursuant to sections 752a et seq. of the Code of Civil Procedure. It is alleged that there are no liens or encumbrances against the vessel. Partnership and accounting problems are not involved."

Section 752(a) of the California Code of Civil Procedure reads, in part, as follows:

"Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action."

Personal jurisdiction over the defendant (petitioner) was obtained by summons (R. 13) and appearance (R. 2).

The record does not evidence any attachment of the vessel. The Supreme Court of the State of California held (R. 32):

"... the state court is competent to decree ownership interests, sale of a vessel, and distribution of the proceeds, at least where the granting of the relief does not conflict with the federal maritime policy that the majority owners determine the use and employment of the vessel. Therefore the respondent court has power to proceed on the petition of the majority owners here.

"The peremptory writ is denied and the alternative writ is discharged."

Certiorari was granted, and the case is now before this Court to review the decision of the Supreme Court of the State of California.

### THE QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the admiralty jurisdiction of the district court extends to a partition action.

2. Is an action for partition of the ownership interests in a vessel an action *in rem*, and hence within the exclusive admiralty jurisdiction of the federal court under Title 28, U.S.C. sec. 1333, or

3. Do state courts have concurrent jurisdiction with federal courts under the "saving clause" of Tit. 28, U.S.C. sec. 1333, to entertain a partition action instituted by a majority of the vessel's co-owners, if there is available an existing remedy by state statute and the granting of relief thereunder will not conflict with the federal maritime policy that the majority owners determine the use and employment of vessel?

### SUMMARY OF ARGUMENT

I. An action for the partition by sale of a vessel, where the owners have unequal interests, is not necessarily "a civil case of admiralty or maritime jurisdiction." The admiralty jurisdiction of such cases is uncertain.

II. If the admiralty court has jurisdiction over a partition action in the circumstances of the case at bar, such jurisdiction is not exclusive, and the jurisdiction of the State courts is concurrent.

A. The jurisdiction of admiralty is exclusive only with respect to actions *in rem* to enforce maritime liens, and does not exclude the jurisdiction of state courts over actions *in personam* and *quasi in rem*.

B. An action for partition is not *in rem* in the admiralty sense. It is *in personam* and *quasi in rem*, within the concurrent jurisdiction of the State courts.

C. The partition statute of California has been construed and applied by the Supreme Court of California in the case at bar in conformity with the foregoing principles.

III. The application of the California partition statute by the courts of that State, in the circumstances of the case at bar, will not interfere with the proper uniformity of the maritime law.

## ARGUMENT

### I

AN ACTION FOR THE PARTITION BY SALE OF A VESSEL WHERE THE OWNERS HOLD UNEQUAL INTERESTS, IS NOT NECESSARILY "A CIVIL CASE OF ADMIRALTY OR MARITIME JURISDICTION." THE ADMIRALTY JURISDICTION OF SUCH CASES IS UNCERTAIN.

Cases exhibit disagreement as to whether an action for partition by sale of a vessel, among owners representing unequal shares, is a "case of admiralty and maritime jurisdiction" within the meaning of the grant of jurisdiction to the Federal Government in Article III, Sec. 2 of the Constitution.

Jurisdiction has been taken and relief granted, in admiralty, where sale has been sought by owners of a one-

half interest in the vessel *The Emma B*, 140 F. 771 (D.C. N. J. 1906); *The John E. Mulford*, 18 F. 455 (S.D. N. Y. 1883); *Copiey v. Copiey*, 8 F. 638 (D. C. Ore. 1881); *Tucci v. Arbusto*, 2d 666 (S. D. N. Y. 1931); *The Ellenora*, 252 F. 300 (D. Wash. 1918); *Skrine v. The Hope*, 22 Fed. Cas. 300, No. 12,927 (S. D. S. C. 1793); *Davis v. The Brig Seneca*, 21 Fed. Cas. 1081, No. 12,670 (C. C. Pa. 1823)

Not such unanimity is found with respect to a similar action urged by holders of unequal, and in particular, minority shares.

In *The Steamboat Orleans v. Phoebus*, 11 Pet. 175 (U. S. 1837), which concerned a libel in admiralty filed by a dissatisfied one-sixth owner of the vessel asking a sale and accounting, Mr. Justice Story remarked (at p. 183):

"... The jurisdiction of courts of admiralty in cases of part owners, having unequal interests and shares, is not, and never has been applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called"

This statement has been quoted in Federal Courts as meaning that admiralty simply does not have jurisdiction of an action for partition by sale where unequal ownerships are involved; *Lewis v. Kinney*, 15 Fed. Cas. 484, No. 8,325 (E. D. Mo. 1879), where a one-third owner sought a sale in admiralty; *The Ocean Belle*, 18 Fed. Cas. 524, No. 10,402 (S. D. N. Y. 1872), where owners of five-sixteenths sought a sale in admiralty; *The Red Wing* 10 F. 2d 389 (S. D. Cal. 1925), where a holder of an unstated interest, but apparently a minority, sought relief in admiralty; *Kellum et al. v. Emerson*, 14 Fed. Cas. 263, No. 7,669 (C. C. Mass. 1854), where a one-fourth owner sought recognition of equitable title, sale and accounting, in admiralty. If this interpretation be correct, and admiralty has no jurisdiction, then plainly the state courts are not deprived of jurisdiction of

such actions, without reference to the clause of title 28, U. S. C. § 1333 which saves to suitors in connection with maritime matters "in all cases all other remedies to which they are otherwise entitled."

Mr. Justice Story's statement, however, has been cited as well by a Federal Court for the proposition that admiralty has jurisdiction but will not exercise it in deference to the rule that the majority must control the use of the vessel: *Tunno et al. v. The Betina*, 24 Fed. Cas. 316, No. 14,236 (D. C. S. C. 1857) where minority holders (extent of minority interest not stated) sought a sale in admiralty.

In all of the cases above cited it may be noted that the party petitioning for sale represented a minority interest. In *Willings v. Blight*, 30 Fed. Cas. 50, No. 17,765 (D. C. Pa. 1800), the moving parties represented a three-fourths interest in a vessel. They asked that Blight show cause why he should not permit the vessel to make a voyage upon the granting by them of proper security for the safe return of the ship.<sup>1</sup> At the time of the court's decision a stipulation had been entered into in which the majority owners gave Blight both security and a share of any proceeds. The court, though not interfering with the stipulation, expressed the opinion that the majority were obliged to give only security and not a share in the proceeds. The court intimated that minority dissenters who hold up a vessel in commerce should be compelled to sell. In stating that this question had not been judicially determined in the United States, the court conceded that "the authorities in the British books lead to the opposite conclusion and leave the

<sup>1</sup> This matter of security for safe return was given an interesting variation in *The Olga*, 254 F. 439 (E. D. N. Y. 1918). A one-fourth owner was ordered given bond by majority owners to insure that he would receive his portion of the proceeds of a sale of the vessel which the majority were entering into. The court could find no precedent but assumed the action proper, analogizing to bonds given by majority holders for safe return, in order to protect the minority. Admiralty Rule 19, 28 U.S.C. covers actions for security for safe return.

subject liable to controversy". This action represents the only one discovered by us, in a Federal court, in which the moving parties represented a majority interest.

The courts of several states have been moved to grant partition by sale of a vessel by both majority and minority interests but as far as can be determined, not by equal owners. All seem to have been aware of Mr. Justice Story's statement in *The Steamboat Orleans* and have, with the exception of the Supreme Court of Washington (*Cline v. Price*, 39 Wash. 2d 816, 239 P. 2d 322 (1951)), and, earlier, the Supreme Court of California (*Fischer v. Corey*, 173 Cal. 185, 159 P. 577, 1917A LRA 1100 (1916)), taken jurisdiction and granted relief both to minority as well as to majority holders. Thus in New York (*Andrews v. Betts*, 15 N. Y. (8 Hun) 322, (1876)—suit by a holder of an unreported interest), the court held that even assuming admiralty has jurisdiction, and seeing no reason why it should not, it is not exclusive by reason of the "remedies saved to suitors at common law." In Wisconsin (*Reynolds v. Nielsen*, 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000 (1903)—suit by a holder of a one-third interest), the court reasoned as in *Andrews v. Betts*, supra, as to the federal forum not being exclusive, but deemed a partition action to be outside admiralty's purview.

In Minnesota (*Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414 (1884)—suit by a holder of a minority interest), the court reasoned that it had jurisdiction since the admiralty does not have or has refused jurisdiction. The court recognized a sale and accounting to be an equity rather than a common-law remedy, but considered the refusal of admiralty to take such cases to leave them to the states.

Louisiana (*State v. Watts*, 7 La. 440, 26 Am. Dec. 507 (1834)—suit by a holder of one-fourth interest) has ruled that state courts have a right to decree sale of a ship as a necessary incident to an accounting and partition of the interests, such jurisdiction being saved by the reservation in the Judiciary Act of all common-law remedies, further,

that if admiralty should take such a case (referring to *Shrine v. The Hope*, *supra*) it does not have the jurisdiction exclusively. And in Pennsylvania (*Courten's Appeal*, 79 Pa. St. 220 (1870)) the court held the part owner of a steamboat entitled to insist upon a fair sale, under the order of a court of equity, although the others had already sold to a party who was dismantling the boat.

Washington (*Cline v. Price*, *supra*—a suit by owners of three-sevenths of the vessel) considered a suit for partition to be a proceeding *in rem* and concluded that jurisdiction *in rem* is exclusively in admiralty, thus ousting state courts of jurisdiction. This case has been criticized: 27 *Wash. L. Rev.* 176, 187 (1952).

California first held (*Fischer v. Carey*, *supra*—a suit by minority owners) that admiralty had jurisdiction unto itself although it may have withheld action because all of the cases before it had been at the instance of minority owners, whereas the majority must rule in the interests of commerce. The court found confusion as to admiralty's jurisdiction likely to have stemmed from the struggle in Britain between admiralty and common law courts with admiralty being powerless to decree a sale (*Ousten v. Hedden*, 1 Will. 101, cited in *Abbott on Shipping* (7th Am. Ed. 1854) at p. 135) until this was remedied by the Admiralty Court Act of 1861 (24 Vict. c. 10). The court appears to have leaned heavily on the principle of majority rule, citing the following from *Tunno v. The Betsina*, (*supra*, at p. 321):

"Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution would be for the majority to render unquestioning accord to the wishes of the minority, no matter how small that minority, or unreasonable its exactions."

The court rejected the action of the minority holder, as not within its cognizance.

In the case now before this court, the California court was presented an action under statutes of the State for a partition by sale at the instance of majority owners, constituting an 85 per cent ownership of the vessel. Petitioner (defendant) here, owner of the remaining 15 per cent interest could not, under the authorities above cited, maintain a suit in admiralty to compel a sale; but his position seems to be that he has some substantive right to be heard in admiralty to prevent a sale by the majority. The court did not depart from its holding in *Fischer v. Carey* that admiralty has jurisdiction, but did find that this constituted no bar, in the light of the amended saving clause (28 U. S. C. A. § 1333), to concurrent jurisdiction of such actions in the States "at least where the granting of the relief does not conflict with the federal maritime policy that the majority owners determine the use and employment of the vessel." (Emphasis supplied.) (Opinion, R. 32-33)

The California court thereby swung full circle on the appealing quotation from *Tunno v. The Betsina*. It would apparently not extend its processes to minority holders, thus sustaining this portion of *Fischer v. Carey*, but would not deny it processes to majority holders desiring to effect use of a vessel by sale, where they were being impeded by a minority "no matter how small that minority or unreasonable its exactions." *Tunno v. The Betsina*.

In sum, the foregoing cases illustrate doubt and dissension as to whether the federal jurisdiction extends to a partition action at all, except where the dispute is between owners of equal shares. If such jurisdiction or power exists in the abstract, it has not been exercised by the Federal Courts. Nor has the possible existence of such jurisdiction ever been held by Federal Courts to exclude the concurrent jurisdiction of state courts over partition actions. It is submitted, on principle, that where the very existence

of the admiralty jurisdiction is doubtful, the doubtful jurisdiction should scarcely be held exclusive.

## II.

**IF THE ADMIRALTY COURT HAS JURISDICTION OVER A PARTITION ACTION IN THE CIRCUMSTANCES OF THE CASE AT BAR, SUCH JURISDICTION IS NOT EXCLUSIVE, AND THE JURISDICTION OF THE STATE COURTS IS CONCURRENT.**

The petitioner contends (Brief, 21) that "an action to partition a vessel certificated under the maritime laws of the United States is an action *in rem* and therefore within the exclusive jurisdiction of the district courts of the United States sitting in admiralty."

We say that it is not.

The concurrent jurisdiction of the state courts is preserved by Tit. 28 U. S. C. Sec. 1333 to suitors with respect to "all other remedies to which they are otherwise entitled"—that is to say, all remedies which are not within the exclusive jurisdiction of admiralty. The remedy which is within the exclusive jurisdiction of admiralty is the action *in rem* to enforce a maritime lien. An action for partition is not such a remedy. It is a remedy only *quasi in rem*, and does not interfere with the admiralty jurisdiction. If suitors are entitled to it by the laws of the state, the remedy of partition is saved to them. This is such a case.

The cases supporting these statements are summarized below.

### **A. The Jurisdiction of Admiralty is Exclusive Only With Respect to Actions *in Rem* to Enforce Maritime Liens, and Does Not Exclude the Jurisdiction of State Courts Over Actions *in Personam* and *Quasi in Rem*.**

The effect of the old saving clause, with respect to demarcation of the fields of admiralty jurisdiction which are exclusive and those which are not, was adjudicated by a series of cases commencing with *Taylor v. Carryl*, 20 How. 583 (U. S. 1858). See *The Moses Taylor*, 4 Wall. 411 (U. S. 1867); *The Hine v. Trevor*, 4 Wall. 555 (U. S. 1867); *The*

*Belfast*, 7 Wall. 624 (U. S. 1869); *Leon v. Galceran*, 11 Wall. 185 (U. S. 1870); *American Steamboat Co. v. Chase*, 16 Wall. 523 (U. S. 1873); *The Glide*, 107 U. S. 606 (1897); *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638 (1900); *The Robert W. Parsons (Perry v. Haines)*, 191 U. S. 17 (1903); *Rounds v. Cloverport Foundry and Machine Co.* 237 U. S. 303 (1915); *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924).

The composite result of these cases is clear; (1) admiralty has exclusive jurisdiction in one type of action only (in the absence of specific federal statute), viz., an *in rem* action to enforce a maritime lien; (2) the saving clause reserves to the states concurrent jurisdiction with admiralty over actions which are *in personam* or which are *quasi in rem*; thus (3) state statutes which purport to create maritime liens and to give their courts power to enforce such liens directly against a vessel are invalid, but (4) state statutes which give rise only to actions *quasi in rem*, as by foreign attachment or execution of *in personam* judgments, are valid.

In *Taylor v. Carryl*, 20 How. 583 (U. S. 1858), an attachment of a vessel under a state court's writ of foreign attachment was sustained as the basis of jurisdiction *quasi in rem*, as between the vessel's owners and creditors.

In the leading case of *The Moses Taylor*, 4 Wall. 411 (U. S. 1867), however, the Court denied jurisdiction to the state courts of California jurisdiction to foreclose a lien for breach of a contract of passenger carriage by proceedings *in rem* against a vessel. The Court made this distinction between admiralty actions *in rem* (forbidden to the state courts) and common law actions *quasi in rem* (sanctioned by the saving clause):

"The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is it-

self seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title, made under its decrees, validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold."

In *The Hine v. Trevor*, 4 Wall. 555 (U. S. 1867), the Court denied jurisdiction to the Iowa courts to enforce a lien for collision damage in an *in rem* action, saying (p. 571):

"But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. \* \* \* the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. \* \* \*

"While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the west called suits by attachment, and in some of the older states foreign attachments. \* \* \* This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to a sale in a common-law court of the state.

"Such actions may, also, be maintained *in personam* against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the 9th section of the judiciary act.

In *The Belfast*, 7 Wall. 624 (U. S. 1869), the Court reached a similar result with respect to an *in rem* action in a state court to enforce a maritime lien for breach of a contract of affreightment, but pointed out that the plaintiffs

might have validly proceeded in the state courts in an *in personam* action, and validly seized the vessel under the state's process of foreign attachment, because (p. 645):

"\* \* \* nothing can finally be held under the attachment except the interest of the owners in the vessel, because the vessel is held under the attachment as the property of the defendants, and not as the offending thing, as in the case of a proceeding in rem to enforce a maritime lien."

In *Leon v. Galceron*, 11 Wall. 185 (U. S. 1870), which sustained the jurisdiction of a Louisiana court to seize a vessel by process of foreign attachment in an *in personam* action for mariners' wages, the Court said (p. 191):

"Suits, by virtue of the saving clause in the 9th section of the judiciary act conferring jurisdiction in admiralty upon the district courts, have the rights of a common-law remedy in all cases 'where the common law is competent to give it,' and the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property.

P. 192:

"Even where a maritime lien arises, the injured party, if he sees fit, may waive his lien and proceed by a libel *in personam* in the admiralty or he may elect not to go into admiralty at all, and may resort to his common-law remedy, as the plaintiffs in these cases did, in the subordinate court. They brought their suits in the state court against the owner of the schooner, as they had a right to do, and having obtained judgment against the defendant, they might levy their executions upon any property belonging to him, not exempted from attachment and execution, which was situated in that jurisdiction."

In *American Steamboat Co. v. Chace*, 16 Wall. 522 (U. S. 1873), in sustaining a state court's judgment for damages for death occasioned in a maritime collision, which de-

pended on the effectiveness of a state survival statute, the Court said, speaking of the saving clause (at p. 534):

"Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, if a maritime lien arises, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the state courts, or in the circuit courts of the United States if he can make proper parties to give the circuit court jurisdiction of his case."

In *The Glide*, 167 U. S. 606 (1897), jurisdiction was denied to Massachusetts to enforce, by an *in rem* action, a maritime lien given by state statutes for repairs to a vessel in her home port; but again the Court pointed out that an *in personam* action accompanied by a seizure of the vessel under process of foreign attachment would have been valid, quoting *Johanson v. Chicago & P. Elev. Co.* 119 U. S. 388, 397 (1886), (*infra*).

In *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638 (1900), in sustaining an Illinois state court's decree enforcing a lien for towage, the Court said (p. 648):

"The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, and the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law and within the saving

clause of the statute (§ 563) of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction."

As to whether the old language, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it", included suits in equity, the Court said, speaking of the suit before it (p. 644):

"It was certainly not a common-law action, but a suit in equity. But it will be noticed that the reservation is not of an action at common law, but of a common-law remedy; and a remedy does not necessarily imply an action . . .

(P. 647):

"In the case under consideration the suit was clearly one *in personam* to enforce a common-law remedy. It was no more a suit *in rem* than the ordinary foreclosure of a mortgage."

In *The Robert W. Parsons* (*Perry v. Haines*), 191 U. S. 17 (1903), the Court, in denying jurisdiction to the state courts of New York to enforce a maritime lien for repairs to a canal boat by an *in rem* action, reviewed a number of the foregoing cases, and said (p. 37):

"In all these cases the distinction is sharply drawn between a common-law action *in personam*, with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding *in rem* against the vessel as the debtor or 'offending thing', which is the characteristic of a suit in admiralty. The same distinction is carefully preserved in the general admiralty rules prescribed by this court; rule 2d declaring that, in suits *in personam*, the mesne process may be 'by a warrant of arrest of the person of the defendant, with a clause therein that, if he cannot be found, to attach his goods and chattels to the amount sued for;' and rule 9, that in suits and proceedings *in rem* the process shall be by

warrant of arrest of the ship, goods, or other things to be arrested, with public notice to be given in the newspapers. The former is in strict analogy to a common-law proceeding, and is a concurrent remedy. The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts."

In *Rounds v. Cloverport Foundry & Machine Company*, 237 U. S. 303 (1915), in affirming a Kentucky judgment which sustained an attachment for a lien for repair of a vessel, and which directed that the vessel be sold to pay the debt, the Court said (at 306):

"Further, it is urged in support of the judgment that the proceeding was *in personam*, and not *in rem*; that the attachment and direction for sale were incidental to the suit against the owners and for the purpose of securing satisfaction of the personal judgment. Accordingly, it is said, the proceeding was within the scope of the 'common-law remedy' saved to suitors by the judiciary act. \* \* \*

"As the last point is plainly well taken, it is unnecessary to go further. It is well settled that in an action *in personam* the state court has jurisdiction to issue an auxiliary attachment against the vessel; and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transcended its authority. The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes, and not merely the title or interest of a personal defendant. (Citing cases) Actions *in personam* with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. (Citing cases) And this is so not only in the case of an attachment against the property of the defendant generally,

but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy *in personam*. (Citing cases)

In *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924), the Court, holding that the provisions of a New York statute authorizing specific performance of arbitration agreements were available in the courts of New York to enforce an arbitration clause in a charter-party, said (p. 123):

"... The 'right of a common-law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (Citing cases) A state may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. (Citing cases) But otherwise, the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit.

P. 125:

"... *In no case has this court held void a state statute which neither modified the substantive maritime law, nor dealt with the remedies enforceable in admiralty.*" (Emphasis added)

The state court has even been held to have true *in rem* jurisdiction (to condemn illegally used fish nets) in *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943), on the ground that this jurisdiction rested in the Exchequer Court and was hence saved as a common-law remedy. Mr. Justice

Black dissented in that case on the ground that to allow a state court to enforce a true *in rem* right would give it power (at p. 154) "to give permanent halt to any portion of the maritime trade and commerce of the nation by bringing in *rem* proceedings against ships." Our case does not involve that remedy nor imply that result.

**B. An Action for Partition is Not in Rem in the Admiralty Sense. It is in Personam and Quasi in Rem. Within the Concurrent Jurisdiction of the State Courts.**

The proceeding *in rem* which admiralty jealously guards and over which it asserts exclusive jurisdiction is tied to, and correlative with, the maritime lien.

In *The Rock Island Bridge*, 6 Wall. 213 (U. S. 1867), the court, in holding that there was no jurisdiction in admiralty of an attempted *in rem* libel against a bridge for damage sustained by a vessel colliding with it, said, speaking of the maritime lien (at p. 215):

" . . . The only object of the proceeding *in rem*, is to make this right, where it exists, available—to carry it into effect. It subserves no other purpose.

"The lien and the proceeding *in rem* are, therefore, correlative——where one exists, the other can be taken, and not otherwise. Such is the language of the privy council in the decision of the case of *The Bold Buccleugh*, 7 Moore, P. C. 284. 'A maritime lien' says that court, 'is the foundation of the proceeding *in rem*, a process to make perfect a right, inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process'."

See also, *The Dutchess*, 15 F. 2d 198 (1926).

But actions for partition are not of this kind. They are not *in rem* in the admiralty sense, but are *quasi in rem*. They have been historically bracketed with foreclosures of mortgages, executions of judgments, attachments to enforce common law liens, all affecting only the interests of the parties.

The distinction between true actions *in rem*, i. e., those to enforce maritime liens, and the common-law remedies "loosely termed proceedings *in rem*", was made in *The Yankee Blade*, 19 How. 82 (U. S. 1857), as follows (p. 89):

"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a 'jus in re,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category.

In *Pennoyer v. Neff*, 95 U. S. 714, (1878), Justice Field said (at p. 734) that:

"... in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by *attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien*. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." (Emphasis added.)

In *Freeman v. Alderson*, 119 U. S. 185 (1886), the Court characterized an action for the partition of real property as an action *quasi in rem*, in the following language:

(p. 187)

"There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant, to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

(p. 190)

"Such action, though dealing entirely with the realty, is not an action *in rem* in the strict sense of the term; it is an action against the parties named, and, though the recovery and partition of real estate are sought, that does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property."

In *Tucci v. Arbusto*, 56 F. 2d 666 (S.D. N.Y. 1931), the district court, on its own motion, refused to sign a default decree in an action in admiralty *in rem* for the partition of a vessel, and directed that process *in personam* issue, saying (p. 666):

"The difficulty with the situation here is that, whilst the marshal has already arrested the vessel on a process *in rem*, there has not been any process *in personam*

issued, and such a process must issue against the co-owner defendant Arbusto and he must have defaulted thereon as a prerequisite to my right to enter a default decree in this matter." (Citing cases)

Benedict (Admiralty, 6th Ed. 1940, Sec. 74, p. 159) cites the Tucci case for the proposition that:

"A decree of partition or licitation cannot issue merely upon a libel *in rem*; it is essential that the co-owner be also sued and served *in personam*."

**C. The Partition Statute of California Has Been Construed and Applied by the Supreme Court of California in the Case at Bar as in Personam and Quasi in Rem.**

The holding of the State Supreme Court challenged by the petitioner was (Opinion, R. 32):

"Decisional law that admiralty has jurisdiction in partition by the sale of a vessel does not necessarily determine that the State does not have concurrent jurisdiction when the remedy therefor exists. On the contrary there is authority to the effect that the state has concurrent jurisdiction in equity to partition a vessel by sale when there is disagreement among the co-owners as to how the ship should be employed. The leading cases (*Andrews v. Betts*, 1876, 15 N.Y. Sup. Ct. Rep. (8 Hun.) 322), and others following it were treated in *Fischer v. Carey*, supra, 173 Cal. at p. 192 et seq. In *Andrews v. Betts* unequal owners sought partition and sale of a propellor operated under acts of Congress on the Hudson River. It was decided that concurrent state jurisdiction existed under state equity powers (as distinct from any common law remedy) to decree partition and sale. That case was rejected in *Fischer v. Carey* because the common law provided no such remedy and partitions in equity was therefore not a remedy reserved to suitors by the federal statute.

"The answer here is resolved by the 1949 amendment to the Judicial Code saving to suitors all other remedies to which they are 'otherwise entitled.' The amendment clarifies the intent to preserve the state concurrent jurisdiction where a remedy is provided under state law which is available to the plaintiffs.

. . . . .

"... It follows that the state court is competent to decree ownership interests, sale of a vessel, and distribution of the proceeds, at least where the granting of the relief does not conflict with federal maritime policy that the majority owners determine the use and employment of the vessel. Therefore the respondent court has power to proceed on the petition of the majority owners here."

The California statute here in question does not purport to create a maritime lien, with which the true admiralty *in rem* action is exclusively linked. It is a general statute, applicable to partition real estate, as well as personalty. In the case at bar, the complaint prays only that the "vessel be sold and the proceeds of said sale partitioned between the parties according to their respective interests in the vessel." (R. 2) No *in rem* determination of rights good against the world is asked or suggested. Jurisdiction over the defendant (petitioner) was obtained by personal service (R. 14) and appearance (R. 2). The defendant has answered (R. 3). There has not yet been any attachment of the vessel. No liens are involved (R. 1, 29). The jurisdiction of the California court is *in personam*, and, when the sale is ordered, will, like any execution, operate *quasi in rem* upon the vessel only to the extent of rights of the owners among themselves. Obviously it cannot, and does not purport to, cut off maritime liens.

In *Taylor v. Carryl*, 20 How. 583, 598 (U. S. 1858), the Court, after quoting 3 Story's Commentaries, sec. 1066, Note 3, said:

"In conformity with this opinion, the habit of courts of common law has been to deal with ships as personal property, subject, in the main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution, *and the titles to them*, or contracts and torts relating to them, are cognizable in those courts." (Emphasis added.)

Petitioner relies upon *Cline v. Price*, 39 Wash. 2d 816 (1951), in which minority owners of a vessel brought an action to compel the majority owners to sell the vessel. The court held that exclusive jurisdiction was in admiralty, and declined relief.

*Cline v. Price* was criticized in 27 Washington L. Rev. 176, 190 (1952) as follows:

"The Washington court in *Cline v. Price* predicated its holding that the lower court had no jurisdiction of the partition action upon the following syllogism: Admiralty has exclusive jurisdiction over action *in rem*, a suit for partition is essentially a proceeding *in rem*, therefore a state court is without jurisdiction of a suit for partition of a vessel. The validity of the minor premise is open to some doubt, and that of the major premise even more so if it is applied uncritically.

"It is submitted that when the Supreme Court has said that actions *in rem* are within the exclusive jurisdiction of admiralty and not within the saving clause, it was talking solely about *in rem* actions, in the strict sense of the term, against a vessel to foreclose a maritime lien. The court has never denied state court jurisdiction in any other kind of case, and the language of the cases, so far as suits between private litigants are concerned, is restricted in this connection to actions *in rem* to enforce a maritime lien.

"The suit for partition was not one in which the vessel was 'itself seized and impleaded as the defendant, (to be) judged and sentenced accordingly.' In *Knapp, Stout & Co. v. McCaffrey*, a state court equity suit to foreclose a possessory lien on a raft of logs for towage, the Supreme Court held it incumbent on the defendant, who pleaded jurisdiction exclusively in admiralty, to show that the proceeding taken was a suit *in rem* as construed in *The Moses Taylor*, *The Hine v. Trevor*, *The Belfast*, and *The Glide*—all cases involving a suit directly against the vessel to appropriate her, as the offending *res*, for the indemnification of the plaintiff. The action before it, said the court, was 'no

more a suit *in rem* than the ordinary foreclosure of a mortgage.' Since the same court in *Pennoyer v. Neff*, and *Freeman v. Alderson* linked actions to foreclose a mortgage and actions for partition as actions *in rem* only in the broad (or *quasi*) sense of the term, as distinguished from the true action *in rem* as defined in the admiralty cases, it should seem that the action for partition of a vessel in a state court is a remedy to which the suitor 'is otherwise entitled,' as not infringing upon the exclusive jurisdiction of admiralty.

"The Washington court in *Cline v. Price* could—and it is submitted, should—have taken jurisdiction over plaintiff's lawsuit. The ultimate result of denying plaintiffs the relief sought may well be correct. As pointed out in the *Cline* case, as a matter of substantive law admiralty will not decree a partition of a vessel at the behest of minority owners who object to the employment to which the vessel is put by the majority. As a matter of uniformity in the maritime law, binding upon both state and federal forums, a state court should doubtless apply this rule. But this is a matter of substantive law, not jurisdiction. *Cline v. Price* has not clarified the scope of jurisdiction in the admiralty."

In the case at bar, the relief sought is not in derogation of any substantive rule of the admiralty law, but in accord with one of its established principles: that the majority shall control the use and disposition of the vessel. Here, the plaintiffs are the majority in interest; in *Cline v. Price* they were the minority. Whether the Washington court was right or wrong in refusing jurisdiction, the California court was right in accepting it.

### III.

**THE APPLICATION OF THE CALIFORNIA PARTITION STATUTE BY THE COURTS OF THAT STATE, IN THE CIRCUMSTANCES OF THE CASE AT BAR, WILL NOT INTERFERE WITH THE PROPER UNIFORMITY OF THE MARITIME LAW.**

Petitioner urges (Brief, p. 23, et seq.) that the assumption of jurisdiction by the Superior Court of California would disturb the proper harmony and uniformity of the mari-

time law. The argument seems to be that admiralty has jurisdiction of a partition action of either majority or minority owners (Brief, p. 24), but as a rule of substantive law will not exercise that jurisdiction except in a suit between equal owners (Brief, p. 25), and that in any event some disagreement would have to be proved in admiralty but not under the California statute.

This is another way of saying that petitioner could and would block a partition suit in admiralty, if we were forced to sue there, and that the eight owners of 85 per cent of the vessel, who want to liquidate their investment, would have to bow to the wishes of the single owner of 15 per cent who wants to keep them locked in business with him, or else buy him out on his terms. The salutary purpose of the California statute is to free co-tenants from exactly that situation. As applied to the tuna fleet, where petitioner says it is a matter of common practice that vessels be owned in co-ownership (Brief, p. 28), the California statute is particularly desirable, to encourage and facilitate maritime investments which would never be made if they were known to be frozen. Nor is there any reason to require proof of disagreement. Co-tenants may agree with one another in every respect save their relative need to recover the cash invested in their common venture. Moreover, petitioner's answer in this case (R. 3), like his brief, makes no claim that he has any reason whatever for objecting to the sale, which he intends to offer either in the State court when this case is tried there, or which he would offer in the admiralty court if we were forced to sue there. If he has a reason why the sale should not be made, under the safeguards for all owners provided by the California statute, he has not said so, either in the State court or here.

The cases petitioner cites in support of the alleged substantive rule, *The Brig Seneca*, 21 Fed. Cas. 1081, No. 12,670 (C.C.Pa. 1828), *The Ocean Belle*, 18 Fed. Cas. 524, No. 10,402 (S.D. N.Y. 1872), *Fischer v. Carey*, 173 Cal. 185 (1916), *Cline v. Price*, 39 Wash. 2d 816 (1951), were all

brought by minority owners with the exception of *The Brig Seneca*, where the court decreed a sale among half owners. The refusal of these courts to recognize a minority's right to demand a sale scarcely establishes a substantive rule that like relief should be denied the majority.

The denial of the majority's desire to sell would seem to conflict squarely with the admiralty rule that the majority may conduct all business pertaining to the vessel. *Steamboat Orleans v. Phoebus*, 11 Pet. 175, (U.S. 1837); *Tunno v. The Betsina*, 24 Fed. Cas. 316, No. 14,236 (D.C. S.C. 1857).

In *Jordine v. Walling*, 185 F. 2d 662, 666 (1950), the Third Circuit Court of Appeals said:

"... The latter clause [the saving clause] has been held to authorize any competent court which has jurisdiction of the parties to entertain a civil action at law for the enforcement of a right conferred by the maritime law where the right is of such nature that adequate relief may be given in such an action. (Citing cases.)

The remedy of partitions, where it conflicts with no other policy, has long been favored by the law:

"Partition is a right much favored, upon the ground that it not only secures peace, but promotes industry and enterprise. The rule of the civil as of the common law that no one should be compelled to hold property in common with another grew out of a purpose to prevent strife and disagreement. Additional reasons are found, however, in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding. Partition proceedings enable those who own property as joint tenants, coparceners, or tenants in common, to put an end to the tenancy so as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and after partition, each has the right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accom-

plished, then the joint estate ought to be sold, and the proceeds divided. Courts should be and are, adverse to any rule which will compel unwilling persons to use their property in common." 40 Am. Jur. § 4, p. 5.

When the "Liberty" is sold and her proceeds distributed pro rata among these nine men, petitioner included, the new owner will presumably put the vessel into service, and if there is any effect on commerce, it will be a beneficial one.

The "Liberty" could have been attached under process of the state court in an *in personam* action, and sold under execution of the state court's judgment. *Taylor v. Carryl*, 20 How. 583 (U.S. 1857); *Leon v. Galceran*, 11 Wall. 135 (U.S. 1870); *Johnson v. Chicago & P. Elev. Co.*, 119 U. S. 388 (1886); *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638 (1900). Even under *mesne process*, and before final judgment, it could have been ordered sold to avoid deterioration, and the proceeds impounded for distribution by the state court. *Taylor v. Carryl*, *supra*.

*Johnson v. Chicago & P. Elev. Co.*, 119 U. S. 388, 399 (1886), referring to non-maritime liens enforced against vessels by suits in *personam*, said:

"... Liens under state statutes, enforceable by attachment, in suits in *personam*, are of every-day occurrence, and may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the Constitution of the United States. There is no more valid objection to the attachment proceeding to enforce the lien in a suit in *personam*, by holding the vessel by *mesne process* to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common-law remedy which a court of common law is competent to give." (Quoted with approval in *The Glide*, 167 U.S. 606, 621 (1897).)

There is no reason, on principle, why a judicial sale initiated by a vessel's majority owners instead of strangers should occasion any greater invasion of admiralty jurisdiction.

If the nine owners had incorporated, the corporation, by a vote of a majority of its stock (here 85 per cent), could have sold the vessel; or the corporation could have been dissolved and its property, the vessel, sold, all without involving the admiralty jurisdiction at all. Here the state statute provides a like remedy for investors who have proceeded as tenants in common instead of by incorporating.

This is a "home port" controversy, a difference of opinion among neighbors, even more remote from its effect on maritime commerce than the question of whether a lien shall arise for home-port materials or repairs. It has been ruled that:

"... so long as Congress does not interpose [sic] to regulate the subject, the rights of material men furnishing necessities to a vessel in her home port may be regulated in each state by state legislation." *The Lottawanna*, 21 Wall. 558, 580 (U.S. 1875), quoted with approval in *The Glide*, 167 U.S. 606, 620 (1897).

It would seem that if the following are "purely local matters" which should or may be left to the states' legal processes—

- (1) specific performance of a contract of sale of a vessel, *The Guayaquil*, 29 F. Supp. 578 (E.D. N.Y. 1939);
- (2) specific performance of a maritime contract containing an arbitration agreement, *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924);
- (3) limitation of workman's recovery for injuries sustained, by statute affecting a maritime right, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922);
- (4) reformation of a maritime contract, *Koninklijke Nederlandsche Stoomboot Maatschappij v. Yglesias*, 37 F. 2d 103 (1930);
- (5) suits to enforce or dissolve a contract of partnership, even though the business of the partnership is maritime,

*The Yankee Blade*, 19 How. 82 (U.S. 1857); *The Red Wing*, 10 F. 2d 389 (S.D. Cal. 1925)—then certainly an action for partition and sale, which is in the nature of a family squabble, should be equally within the states' jurisdiction. A petition to dissolve the joint ownership of a vessel is not unlike a dispute arising from a marine partnership agreement, over which state courts have long exercised jurisdiction.

It has been suggested that where possible conflict between local and admiralty law may occur, uniformity may be achieved and the application of state law continued by utilizing the principles developed in connection with the commerce clause of the Constitution. Note, 17 *Geo. Wash. Law Rev.*, 353 (1949). The national interest in the field of maritime activity is analogous to that in the field of commerce. Commercial necessities, therefore, should determine the extent to which uniformity is required in maritime law. This was the principle announced by Mr. Justice McReynolds in the *Rohde* case, *supra*. Application of the law of California in this action would not interfere with the harmony and uniformity of maritime law in its international or interstate aspects. Trade between the states and foreign nations would be in no way impeded or obstructed. No excessive burden would be placed on those who own and manage commercial vessels. On the contrary, in view of the policy reasons favoring an easy severance of common ownership interests, the business of carrying on trade by watercraft would be benefited by the simple procedure for partition provided by California law.

We say that either admiralty has no jurisdiction of a partition action among owners of unequal shares, or if it does have such jurisdiction, it is not exclusive but concurrent with that of the state; that the substantive rule in admiralty is that the majority shall control the use and disposition of the vessel; and the enforcement of a like rule by a state court in decreeing a sale on suit of the majority owners is consistent with, not in derogation of, that substantive rule of admiralty.

**CONCLUSION**

For the reasons stated, we respectfully submit that the decision of the Supreme Court of the State of California should be affirmed.

Respectfully submitted,

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